

Small open economies and “the rise of the rest”

A study of Norwegian politics on bilateral investment agreement towards China



Emilie Ekeberg

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Abstract

This thesis seeks to explain why Norway has recently changed its policy on investment agreements with emerging economies. To do so, the preferences and interests surrounding negotiations between small open economy Norway and large emerging economy China for a bilateral trade and investment agreement are studied. Departing from Robert Putnam's model of the two-level game, the thesis discusses the relevant actors and mechanisms in changing this policy at three analytical level (domestic, bilateral and systemic): i) the role of domestic corporate interests, ii) the shift in interest and policy among emerging economies, and iii) the failure of multilateralism in international trade and investment policy. The main methodological approach is an embedded case study of the China-Norway negotiations, drawing on empirical insights from other bilateral relationships, particularly between small open economies and large emerging economies (e.g. India-Efta, Brazil-Norway, China-New Zealand). The interests and strategies on investment and investment agreements of domestic Norwegian corporations, and their possible channels of influence on public policy, are examined through interviews with key informants in the Norwegian business sector and interest groups. The interests in and policy of bilateral investment agreements of China and other emerging economies are examined through reviews of former agreements, as well as statements of influential Chinese foreign policy think tanks. Norway's position as a small power in a world of increasing bilateralism, and the way this influences the relationship with large emerging powers is examined against the overall trends in global trade and investment agreements. The thesis argues that the Norwegian policy changed should be viewed in light of the changed interests of China and other emerging economies in investing abroad. While the Norwegian business lobby and telecoms industry is pushing this policy change in general, the domestic corporations are not found to be the primary initiators of this policy change towards China.

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List of Abbreviations

BIT.....	Bilateral Investment Treaty
BRIC.....	Brazil, Russia, India, China
CPC.....	Communist Party of China
CHALCO.....	Aluminum Corporation of China Limited
CNOOC.....	China National Offshore Oil Corporation
EFTA.....	European Free Trade Association
FDI.....	Foreign Direct Investment
FTA.....	Free Trade Agreement
MFN.....	Most Favored Nation
NHD.....	Norwegian Ministry of Trade and Industry
NHO.....	The Confederation of Norwegian Enterprise
ICSID.....	International Centre for Settlement of Investment Disputes
LNG.....	Liquefied Natural Gas
LO.....	The Norwegian Confederation of Trade Unions
OECD.....	Organization for Economic Co-operation and Development
SOE.....	State Owned Enterprise
SWF.....	Sovereign Wealth Fund
TNC.....	Transnational Corporation
WTO.....	World Trade Organization

Chapter 1: Introduction

This thesis examines the recent change in Norwegian policy on bilateral investment agreements. It argues that this policy change should be viewed in light of changed interests and power of the emerging economies, as well as Norwegian corporate interests especially in the telecoms industry.

Norway is currently negotiating an agreement with China that would give the corporations of each country the right to sue the other state in an international court, in the case of investment disputes. Investment agreements intend to limit the risks of investing in countries with unstable regulatory frameworks, thus stimulating foreign investments especially into developing countries. In the late 1990s such agreements were subject to much public debate, and protested by environmental NGOs and trade unions which claimed they would limit the policy space of states to promote an ecologically and socially sustainable development. They joined forces to block a multilateral attempt to negotiate such provisions in the so-called MAI agreement (The “turtles and teamsters” alliance).

In recent years such provisions have shown up again in bilateral agreements, and led to new examples of disputes challenging regulations on environment protection, public health and provision of public services. In 2009 the Canadian mining corporation Pacific Rim filed a law suit against Central American country El Salvador, claiming \$77 million in compensation for lost future profits. The same year, Swedish power company Vattenfall filed a law-suit against Germany, claiming €1.4 billion. Pacific Rim is challenging a rejection of an authorization to extract gold from the “El Dorado” mine East in the country, since the state of El Salvador claims that the corporation’s gold mining project is a threat to public health and the environment, due to the discharge of toxic cyanide chemicals to the surrounding environment of the mines. This dispute is still pending at an international arbitration tribunal for investment disputes. The dispute between Germany and Vattenfall was settled in August 2010. Vattenfall was claiming that the implementation of EU regulations on water quality was limiting their future profits. These regulations would affect the discharge of cooling water from a coal-fired power plant being built alongside German river Elbe, which runs through Hamburg. The agreed amount of the settlement between the parties was not made public.¹

¹ IISD (2009), Investment Treaty News (2011). See also www.icsid.worldbank.org.

These new agreements and recent disputes, and the fact that Norway is now negotiating such potentially controversial provisions with China, have not been subject to nearly the same level of attention as in the late 1990s neither by mainstream media or social movements, nor in the academic world.

1.1 Foreign direct investments and “The rise of the rest”

The rising economic and political power of the emerging economies has been described as “the rise of the rest”. In 2001, Jim O’Neill, a Goldman Sachs investment banker coined the term BRIC-countries (an acronym standing for Brazil, Russia, India and China) to describe the rising economic power of developing countries with large populations and high economic growth-rates. In March 2011, O’Neill (now often referred to just as Mr. BRIC) stated that the traditional economic and political powers, the US, Europe and Japan, are experiencing falling growth rates and unemployment- and credit crises, and are failing to acknowledge that there is now a new economic world order. He added that the only plausible strategy for westerners is to find their competitive advantage and serve the still more prosperous Chinese population, but that the thoughts of western opinion-makers and politicians are “so dominated by western influence, that they do not understand the world.”²

Still more “western” corporations are, in fact, investing in the above-mentioned emerging markets. Foreign direct investment (FDI) is the direct investment of a corporation in a commercial venture in another country. Such investments are characterized by a long-term obligation and managing interest in that commercial venture and are becoming still more prominent in the global economy. Since the late 1990s FDI flows have increased rapidly - both between developed countries - and between developed and developing countries.³ The emerging economies (the BRIC-countries) in particular are attracting still larger shares of FDI. In 2002 China bypassed the US and became the largest recipient of FDI in the world.⁴ A more recent trend is that emerging economies are investing abroad to a still larger extent: in 2007 China was ranked as the largest foreign investor among developing states and the 13th largest foreign investor in the world.⁵

² Aftenposten (2011d). My translation.

³ UNCTAD (2009): P. 4, Figure I.1.

⁴ Gallagher and Shan (2009): 1.01 -1.02.

⁵ Ibid.

1.2 Regulating the rights of foreign investors

The rise of FDI into developing market economies that are not OECD-members makes agreements on rights of foreign investors a still more important issue in global economic policy. Bilateral investment treaties (BITs) are agreements between states that regulate the rights of private investors in the partner country. They usually include provisions on non-discrimination between foreign and national corporations, compensation in the case of expropriation, and the agreed use of an international arbitration tribunal to resolve disputes between investors and the host country. These disputes can challenge political regulations of the host country, because of a widened definition of expropriation. In the original meaning of the word, expropriation refers to authorities suspending or confiscating private property. In international investment agreements the term has been widened, so that it also includes lost future profits on investments as a consequence of political regulations that limit these profits. These provisions on arbitration give foreign investors the right to try government's social, environmental or economic regulations at an arbitration tribunal, when these regulations are thought to have limited profits on an investment in another country. The most usual provisions on arbitration give foreign investors the right to sue the host-state at a tribunal outside of the national legal system, most often at the international arbitration tribunal ICSID⁶, which is part of the World Bank. While these investment agreements are primarily protecting existing investments, some agreements also gives foreign investors rights regarding market access (for instance the US/NAFTA BITs do this by extending National Treatment and Most-Favored-Nations (MFN) provisions to the pre-establishment face⁷).

The existing global policy framework is a patchwork of investment agreements that includes bilateral investment treaties, agreements under the OECD and some areas which are covered in the GATS-agreement of the WTO. Attempts to negotiate an international framework on investment protection have been controversial. Several attempts, such as the OECD MAI-agreement and the Singapore-issues in the WTO, have failed. With the lack of a multilateral regime regulating FDI and limited progress in multilateral negotiations, still more countries are entering into bilateral investment agreements (BITs). In 2009 82 new BITs were concluded⁸, out of which 19 were signed between two developing countries. There is now a total of 2750 BITs in

⁶ International Centre for Settlement of Investment Disputes

⁷ Gallagher and Shan (2009): 9.08

⁸ UNCTAD (2010): 81

the world. The trend of rapid treaty making continued in 2010. So far, the member states of the European Union have negotiated BITs separately. The EU-member states have signed more than 1200 BITs⁹. The Lisbon Treaty (which came into force December 1 2009) moves the competence to negotiate investment agreements from the member states to the EU-level. The European Commission, Parliament and Council are currently discussing the content of future EU policy on investment agreements,¹⁰ and the EU is currently negotiating a BIT with China. The two countries that have signed the most BITs are Germany and China, 135 and 125 respectively.¹¹

As a parallel trend, investment agreements have also been included in bilateral free trade agreements (FTAs) in recent years. These bilateral FTAs have increased both in number and in scope, as WTO-negotiations (the Doha-round in particular) have been at a stalemate over the last decade. This has meant that still more countries seek to liberalise trade and investment further by engaging in bilateral negotiations. Only from May 2008 to July 2010, the number of bilateral and regional FTAs – notified to the WTO and in force - has risen from 205 to 283 agreements.¹² There are a large number of agreements under negotiation. These bilateral agreements are also known as WTO+ agreements, since they go further in trade- and investment liberalisations than the existing WTO-agreements. In the academic literature on bilateral FTAs, the “jury is out” on whether the trend of including the provisions of BITs in FTAs is bound to continue – driven by foreign investor interests - or whether the controversy regarding policy space and right to regulate will put a stop to this trend.

1.3 Norwegian change of policy

Both these trends, rising FDI into developing countries and emerging economies, and rising bilateralism in trade politics, apply to Norway. The foreign direct investments of Norwegian companies to non-OECD member states have risen from approximately 16 billion NOK in 1998, to 260 billion NOK in 2009.¹³ Although a self-declared multilateralist state, Norway has in recent years entered into a number of regional and bilateral FTAs. The Norwegian government is

⁹ S2B (2011), UNCTAD (2010): 84.

¹⁰ Ibid.

¹¹ Gallagher and Shan (2009): 1.01, 1.02

¹² WTO (2011), Heydon and Woolcock (2009): 9

¹³ Statistisk Sentralbyrå (2011): Tabell 1: Direkteinvesteringer i Utlandet. 1998 – 2009.

currently negotiating or launching negotiations with several emerging economies, such as India, Thailand, Indonesia, Russia, Vietnam and China.¹⁴

Traditional Norwegian reluctance to enter into investment agreements, both bilaterally and multilaterally, has been reduced in recent years. From the mid-1990s Norway abstained from entering into bilateral investment agreements because of political controversy following the debates on the OECD MAI-agreement. However, in 2008 the Norwegian government sent a proposal for a Norwegian model of bilateral investment agreements with developing countries and transition economies in a public hearing. This proposed agreement was primarily an investment *protection* agreement, but also included some provisions regulating market access of foreign investors.¹⁵ In the appendix to the hearing letter it is explicitly stated that this model agreement is concerned with protecting Norwegian investments abroad, and that other concerns would be raised if these agreements should be negotiated with other developed countries.¹⁶ In the hearing letter the government stated that it had two motivations for this proposed policy change. First, to protect the foreign investment's of Norwegian corporations in order to ensure their competitiveness. Second, fighting poverty and promoting economic and social development in developing countries through private investments creating jobs and infrastructure.¹⁷ This model agreement was shelved after the hearing, due to political controversy inside the government coalition. Domestic and international NGOs and social movements were also unhappy with the model agreement, fearing loss of policy space and democratic deficits. The business sector and its interest organizations welcomed the initiative, but complained that the model agreement did not grant Norwegian corporations the same level of investment protection as their competitors in Europe and the US. Hence, as an alternative, the government opened up for an ad-hoc solution, including this issue in four bilateral FTA negotiations. The Norwegian government in its 2009 government declaration (Soria Moria II) stated that it would expound the need for provisions on investment protection in the ongoing FTA negotiations with China, India, Russia and Ukraine.¹⁸ The shelved model agreement is now serving as a basis for the Norwegian positions in these negotiations.

¹⁴ For the full list of partner countries see: NHD (2011)

¹⁵ Appendix to the hearing letter, page 9. This can be found in NHD (2008)

¹⁶ Appendix to the hearing letter, page 5-6. This can be found in NHD (2008)

¹⁷ See the hearing letter, and page 9 in the appendix to the hearing letter, both in NHD (2008)

¹⁸ Soria Moria II (2009): 13

1.4 Research question

Norway is a self-declared multilateralist state with a strong corporatist institutional model at the domestic level. Yet, the Norwegian government is now negotiating potentially controversial bilateral investment agreements. This seeming paradox is an interesting puzzle. Additionally, the Norwegian government has argued that this policy change should be seen in connection to general developmental policies of fighting poverty in developing countries, by promoting private investments. These provisions are now being negotiated with emerging powers who are also investing in Norway. Stemming from an interest in this discrepancy, the research question that this thesis aims to answer is:

What explains the change in Norwegian policy on bilateral investment agreements?

This change of policy, as observed in the government declaration, will be examined through an embedded case study of the ongoing FTA negotiations with China. It is embedded in the sense that it draws on empirical evidence from the general rise of bilateral investment agreements in the world. It is not an analysis of the actual negotiations between Norway and China. During the course of this research the role of high politics in bilateral FTA negotiations has been emphasized, when the awarding of the Nobel Peace Prize in December 2010 put these negotiations to a halt and left the issue to be surrounded by secrecy.¹⁹ Rather, it is an analysis of interests and preferences surrounding these negotiations, through an examination of Norwegian interest coalitions and their channels of influencing public policy, and a more general study of the interests of China. These preferences, both domestic and bilateral, are examined through in-depth interviews with informants in Norwegian corporations and interests organisations, and through an analysis of the general Chinese policy of trade and investment agreements.

There is a general tradition of secrecy in Norwegian bilateral trade policies. These agreements are not subject to public debate in the parliament before negotiations (as in the EU Parliament and the US Senate). Norwegian positions are not publicly available or subject to general debate. The controversy surrounding the Nobel Peace Prize has strengthened this tendency in the negotiations with China. While limited data access will inevitably bring some limitations to a study of ongoing negotiations with China, this arguably makes it even more important to study them. Norway is a late-comer in the negotiations of bilateral investment agreements. In general, the negotiation of investment protection in bilateral FTAs is a new phenomenon. International

¹⁹ This thesis does not study the role of high politics in the negotiations, but focuses on the role of low politics, i.e. the economic interests surrounding the negotiations.

standards are being developed, that will plausibly influence Norway. As a small power negotiating with powerful emerging economies, it is important to study the global context and developments surrounding these negotiations, in light of changing geo-political power structures. It is a moving target, but then again, political scientists are not historians. The lack of public debate limits the general knowledge produced through public debate (the deliberative debate of arguing back and forth). In other words, if secrecy leaves scholars to dismiss studying controversial and important phenomena, but only search for the perfect research design fit to a rigorous reading of methodology, they are neglecting their role as knowledge-contributors, and allowing others to dictate their possible research questions.

1.5 Analytical focus and theoretical choices

This thesis is situated in the field of global political economy, meaning that it is concerned with the linkages between politics and economy in world affairs. The thesis takes the multilevel model of Robert Putnam, with his two-level analysis of international diplomacy, as a starting point and examines three possible levels of explanations to the change of Norwegian policy on investment agreements. At each level theories of which mechanisms and actors influence the policy change are applied. In defining the actors relevant for this study, the typology of Rob van Tulder is useful. China is characterized as a large emerging economy with a business-statist institutional model, while Norway is characterized as a small open economy with a corporatist institutional model. The special characteristic of the corporations in these institutional models are also given attention. This typology makes analytical generalizations and comparisons with similar bilateral relationships possible.

The thesis applies three analytical levels: domestic, bilateral and systemic. First, domestically in Norway, with a strong corporatist institutional model, it can be expected that certain business interests would request investment protection. This is most relevant for businesses operating in sectors with capital-intensive investments, and large “sunk costs”, which are also investing in the emerging market economies today, or planning to do so in the future. Other relevant actors are the interest groups of the corporatist model, namely the NHO and LO, in addition to developmental NGOs, domestic and international. These interest organisations can be assumed to hold both defensive and offensive interests on the issue of investment protection.

Second, a possible explanation that will be analysed in this study is that the policy change is imposed from the negotiating partner. With emerging market economies both attracting FDI and investing abroad, the rise of bilateral investment agreements may also be a development pushed by the emerging market economies and the changing geopolitical power-scene. The power

relationship between the actors in the negotiations, in this case Norway and China, are considered based on compulsory and institutional theories of power in international relations.

Third, the change of policy could be caused by the general failure of the multilateral system to produce new agreements, and the fact that Norway is positioning itself in a world of bilateralism. The most relevant actors are the member states of the EFTA corporation. The systemic level of explanation also includes the so-called bandwagon thesis: that Norway has observed the global trend of bilateral investment agreements and decided to jump on the bandwagon, in order not to be left behind.

1.6 Approach and methodology

The thesis is based on an embedded case study drawing on a triad of data: Interviews with key informants, written hearing letters and memos, former bilateral agreements, and analysis of the processes leading up to these former agreements.

My primary case is the ongoing negotiations between Norway and China, for a bilateral trade- and investment agreement. The parties have carried out a Joint Feasibility Study, and negotiations have been under way since September 2008. Investments are a central question of the negotiations. In the Joint Feasibility Study the parties state that it is an important goal that the agreement should facilitate further investments between the two countries. Comparisons are made to the ongoing negotiations between EFTA and India. On the domestic level, central data has been gathered through in-depth interviews with key informants in Norwegian corporations and interest organizations, focusing on their views on investing in emerging market economies China and India, as well as their views on bilateral investment agreements.²⁰ The public hearing on a Norwegian model agreement for investment protection agreements with developing countries provides central empirical evidence of the standpoints of various institutions in Norway on investment agreements. On the bilateral level, Chinese policies and practice in their former investment agreements is examined, with a special focus on the investment provisions in a bilateral FTA between China and New Zealand. Other central data is an analysis of statements of influential Chinese foreign policy think tanks. On the systemic level, primary data is a thorough publication comparing American, European and Asian approaches to bilateral trade and

²⁰ Nine in-depth interviews with informants in Statoil, Telenor, Hydro, Orkla, the Norwegian Confederation of Enterprise and the Ministry of Trade and Industry have been carried out in Oslo during winter and spring 2011. These are referred to according to the date of the interview. For a list of the interviewed informants, including the date of the interview, see appendix 1. In addition, some informal conversations and personal communications are included.

investment agreements, as well as interviewed informants in the Ministry of Trade and Industry and NHO.

1.7 Thesis structure

The thesis first describes the theory and analytical framework used to examine the Norwegian policy change on bilateral investment agreements. Robert D. Putnam's model of *The logic of Two-level games* is described, and grounded theories of possible channels of influence through political institutions are applied to both Norwegian and Chinese constituents. Power theories relevant to the relationship between Norway and China are examined, and the primary actors are defined according to their relevant institutional characteristics. Finally, three levels of analysis are derived (domestic, bilateral and systemic), and the relevant theoretical assumptions of which actors influence policy at each level is summarized (chapter 2).

The main approach of this study is an embedded case study of FTA negotiations between Norway and China. The advantages and limitations of case studies are discussed, giving special attention to the potential of making general claims outside the single case studied. Data-analysis is discussed, especially according to elite/expert interviews. Finally validity and reliability concerns of the study is presented (chapter 3).

The analysis is structured according to the analytical levels applied. At the domestic level, the offensive interests in Norway are examined first. Sector interests on investing in China and the emerging economies are mapped, and their assessments of the regulatory framework and the need for investment agreements with China and the emerging economies is analysed. Finally, the channels of influence on Norwegian policy positions are examined, focusing primarily on the relationship between the Norwegian business sector and the negotiators in the Ministry of Trade and Industry (chapter 4). The defensive domestic interests in Norway are then examined, focusing primarily on the actors that have formerly blocked a Norwegian policy change. Their changed actions at the domestic game board are analysed, primarily according to secrecy and the party-political composition of the government in power. It is also discussed which actors in Norway could block the Norwegian policy change on investment agreement at time of ratification, in relation to possible Chinese investments in Norway (chapter 5).

On the bilateral level, it is first discussed whether it is plausible to assume that China and the emerging economy has asked Norway to change its policy on investment agreements. The general BIT policy of China is examined, with a brief comparison of the BIT policies of other emerging economies. Then, China's FTA policy is given attention, focusing primarily on their

motivations for choosing certain negotiating partners. China's possible interest in demanding investment protection from Norway is then discussed, based on an analysis of influential Chinese foreign policy think tanks, as well as interviewed key informants in the Norwegian business sector. Finally, the power relationship between the actors is analysed (chapter 6).

The systemic level is analysed in general terms, due to the restrictions on data access stemming from Norwegian secrecy in bilateral trade and investment policies. First, the general development in Norwegian bilateralism is examined. Then, the role of EFTA in a world of increasing bilateralism is analysed. It is then discussed to what extent the Norwegian government has changed its policy due to this new role of EFTA (chapter 7). In the concluding chapter the major findings are summarized, and possible future scenarios are discussed (chapter 8).

Chapter 2: Theory and analytical framework

The aim of this chapter is to provide the theoretical framework for analyzing how different actors influence Norwegian policy on bilateral investment agreements. This thesis is placed in the theoretical field of global political economy. It is concerned with the intersecting point of politics and economy in international affairs and the political bargains over how to distribute gains and losses from global economic activity. The main theoretical approach in the thesis is multi-level game theory, which is a rationalist theory that assumes game behavior as strategic actions of rational actors. The theory of the multi-level game is coupled with theories of power in international relations, which are also rationalist in the sense that the applied power theories focus on strategic actions of rational actors. This analytical choice is pragmatic, and is not an expression of a particular epistemological preference or standpoint in the post-positivist debate. At the same time, this excludes explanations giving importance to the power of ideas and ideology in shaping behavior in the global political economy. This is not to exclude that such idea play a role for the global rise in FDI and regulations of foreign investments.

This chapter first presents the main theoretical framework of the multi-level game seeing international diplomacy as intertwined domestic and international bargains (section 2.1). It then presents the domestic game board and the role and conflicting interests of domestic constituents (section 2.2), and the international game board and the framework for analyzing the bilateral relationship between the negotiating states (section 2.3). The way domestic interests are channeled through political institutions is then described (section 2.4). Relevant theories for analyzing the power relationship between the negotiating partners are presented (section 2.5), and the actors relevant for the study are then categorized according to their primary institutional model. This is done in order for comparisons between the actors to be possible (section 2.6). Finally, the framework is divided into three different analytical levels of possible explanations of the change in Norwegian policy on bilateral investment treaties, summarizing the most important theoretical factors expected to influence policy-outcome in both Norway and China (section 2.7).

2.1 Negotiations as a multi-level game

The classic contribution of Robert Putnam on two-level games offers useful insights to the ongoing negotiations for a bilateral trade and investment agreement between Norway and China. The central claim of Putnam is that domestic and international bargaining over policy positions in international negotiations cannot be separated, but must be analyzed as processes that are

intertwined and affect each other. According to this theory, negotiating a bilateral agreement requires negotiations both with the partnering state, but also with domestic constituents.

The model of Putnam has been subject to thorough testing and further development through a wide range of case studies and the grounding of the theory has both widened the geographical scope and elaborated the model thematically.²¹ Although some reservations must be made of the changed context, this has nuanced the models relevance to the empirical problem examined in this study. Namely with regards to which characteristics of the model are most relevant in trade and investment negotiations. The grounded theory finds that the pressure of domestic constituents is much higher in trade negotiations than in negotiations on for instance security politics, especially when economic interests are sector-specific.²²

The multi-level game consists of several “game boards”: The negotiations between the two countries for an agreement is level I, whereas level II consists of two game boards; the separate discussions between Norwegian constituents about whether or not to ratify the agreement negotiated at level I, and a similar game board among Chinese constituents. Ratification does not necessarily require a formal voting procedure, and it is not a premise for the model that states are democratic. Ratification is simply understood as whether or not the agreement is accepted in the home country.²³

Accordingly, in order for the negotiations to be successful the negotiators must agree on a deal that can be accepted in both countries. Putnam defines all possible agreements that can be ratified at home as a win-set. The win-sets of China and Norway will not be identical, but they must overlap in order for the parties to be able to reach an agreement. The number of agreements that are placed within both China and Norway’s win-sets are possible outcomes of the negotiations between Norway and China. In practice, before formal negotiations for bilateral trade- and investment agreement are launched, the parties carry out a joint feasibility study, identifying areas in which an agreement will be in the interest of both parties.

²¹ Evans, Jacobson & Putnam (1993)

²² Evans, Jacobson & Putnam (1993): 404

²³ Putnam (1988): 436-437

2.2 The domestic game board

“The size of the win-set depends on the distribution of power, preferences, and possible coalitions among level II constituents”, Putnam states.²⁴ This means that the two-level model of international negotiation should be paired to relevant theoretical and analytical frameworks on domestic politics to map the preferences of the different parts of the constituency and analyze how the different preferences are channeled into public policy. Michael Hiscox argues that this requires a mapping of the preferences of the constituents, but that it is sufficient to map these preferences according to the economic effects on various interest groups of the agreement.²⁵ This arguably leaves out some important aspects, for instance how ideas are formed and how political issues are framed in the political debate. This, of course, will also influence which groups in society participate at the level II game board. Still, the analyzed constituents in this case, primarily the interest groups of industry and workers, are vocal and can be expected to define their interests largely based on the actual economic consequences they expect to experience. After having mapped these preferences, this, in turn, requires a political analysis of the different political institutions of the level I – players.

2.2.1. Heterogeneous interests

In some international negotiations the preferences of the domestic constituents of each country are largely homogeneous, meaning that the negotiators can follow a simple “the more, the better”-recipe. In other cases, like in the China-Norway FTA negotiations, these preferences are heterogeneous, meaning that all possible agreements have uneven consequences for constituents. In turn, the result of the bargain can be criticized both for going too far and for not going far enough.²⁶ The interest cleavages between different constituents vary according to both the issue under negotiation, as well as industry sector. The fact that the Norway-China negotiations are a multi-issue negotiation, including diverse issues such as trade in goods and services, investments, environmental sustainability etc, complicates the matter further. According to Michael Hiscox’s contribution to the two-level model, workers and capital owners tend to share similar positions on trade policy within the same industry. On the other hand, workers and capital owners tend to hold opposite positions within industries when negotiating regulations of inflow of capital, or inward FDI.

²⁴ Putnam (1988): 442

²⁵ Hiscox (2008): 97

²⁶ Putnam (1988): 444

In general, on the question of investment agreements, Norwegian and Chinese constituents hold both defensive and offensive interests. Some claim that protectionist groups are the strongest in lobbying, as it is easier to mobilize those that will suffer than those that will benefit.²⁷ While this complicates the negotiations, it also makes alliances across the domestic game tables possible. This is the case when cleavages cut across the international level, and the negotiator can find silent allies at his opponent's domestic table and transnational alignments may appear. As well, a government that is internally divided on an issue, as is the case for the Norwegian Government on the question of investment protection agreements, is more likely to be able to strike a deal, according to Putnam.²⁸

The cost of no-agreement among the different constituents is relevant to the size of the win-set. It is a general rule that the lower the cost of no-agreement for constituents, the smaller the win-set.²⁹ For some constituents this, in turn, depends on the specifics of the actual agreement, in essence the results of the actual negotiations. For others, opposition or support for the level I-agreement is generic, and the actual content of the agreement will not change their positions. In the grounded theory of the two-level game stemming from empirical testing of Putnam's two-level model, it seems that transnational actors, for instance transnational corporations, have a lower cost of no-agreement than domestic actors, as the transnational actors have other ways to influence international policies, and are not as dependent on the home state and its efforts to negotiate international agreements.³⁰

2.2.2 Secrecy and political controversy

In general, the Norway-China negotiations should be expected to have a high degree of participation among level II-constituents, as trade agreements have consequences, both negative and positive, for many areas of society. Still, this trend is countered by the level of secrecy in the negotiations. According to Putnam, it is rational for negotiators to keep positions and demands in the negotiations secret. Secrecy leads to a lower rate of participation from constituents, which in turn enlarges the size of the win-set. This is especially true for the question of investment protection, as this is a politicized issue, and has proven to be controversial among Norwegian

²⁷ Hiscox (2008): 119

²⁸ Putnam (1988): 445

²⁹ Putnam (1988): 442

³⁰ Evans, Jacobson & Putnam (1993): 418-420

constituents. According to Putnam, politicization activates groups that are less worried about no-agreement. This reduces the effective win-set size. Secrecy can therefore be expected to help not to politicize negotiations: “This is one reason why most professional diplomats emphasize the value of secrecy to successful negotiations.”³¹ This also has implications for the possibility of cross-table alliances at the domestic game-boards. The lower political visibility, and the more frequent the negotiations rounds, the more important the cross-table alliances between free trade advocates in the two countries.³²

2.3 The international game board

While the preferences, power and interests of domestic constituents is one factor determining the policies of the level I negotiators, surely international actors can also influence these positions. Most relevant is the negotiating partner, China in this case, but the role of other international actors should also be considered.

The theory of the multi-level game is applicable to all sovereign, yet interdependent states.³³ Still, these are not dichotomous categories, and the sovereignty of both parties to formulate their policies in the bilateral FTA negotiations is limited through their membership to the WTO and other international organizations. In general, according to Putnam’s theory, a country like China should be expected to have larger “isolationist” forces than a country like Norway, since “all-purpose support is greater in smaller countries, as compared to more self-sufficient countries like the US.”³⁴ In the same line of argument, more self-sufficient states (less reliant on others) should make fewer agreements and/or drive harder bargains when they go into negotiations.

In the same line of argument, the interdependency, which is especially characteristic for small open economies like Norway, opens up a wide range of opportunities for the level-I negotiators. Also, when negotiating multi-issue agreements, such as the China-Norway negotiations that include issues as diverse as trade in goods and services, intellectual property rights, investments and environment and human rights, there is a possibility for negotiators to be more strategic than in single-issue negotiations: “The possibility of package deals opens up a rich array of strategic

³¹ Putnam (1988): 442

³² Putnam (1988): 459

³³ Putnam (1988): 434

³⁴ Putnam (1988): 443

alternatives for negotiators in a two-level game.”³⁵ This means that negotiators may create policy options that were not available in a domestic context. For instance by increasing the exports of Norwegian corporations, which could in turn lead to trade unions accepting also the parts of the agreement that threaten the more defensive goals of the trade unions, like for instance preserving jobs for public sector employees. According to Putnam, a higher degree of interdependency opens more opportunities for new domestic coalitions.

In this respect, the strength of the state and the degree of autonomy from different interest groups among the constituents also influence the win-set. The greater the autonomy of central decision makers from their level II constituents, the larger the win-set. Still, state strength also implies less bargaining power in the negotiations, as the negotiator can to a less degree make a plausible claim that domestic interests prelude a possible deal.³⁶

There is not a separate multilateral/systemic game-board in Putnam's theory, only the domestic game boards and the level I game-board between state parties. But the level of international systemic pressure should not be overlooked. This is included in Putnam's theory as reverberation (international pressure). What Putnam terms “positive reverberation” is especially important, which means that international pressure expands domestic win-set.³⁷ On the other hand, empirical evidence shows that international pressure will less often decrease the win-set size, or make the domestic interests less prone to accept a level-I deal.³⁸

2.4 Political Institutions

Several scholars, including Putnam himself, have pointed to the fact that the theoretical model of the two-level game needs to be developed further to explain how and through which channels the different constituents at the level II game board influence policy positions in the actual negotiations.³⁹ This is especially true in the analysis of Chinese political institutions, as this model has mainly been developed with regard to the political institutions of democratic states.

³⁵ Putnam (1988): 446

³⁶ Ibid.

³⁷ Putnam (1988): 456

³⁸ Ibid.

³⁹ Hiscox (2008): 127, Evans, Jacobson & Putnam (1993), Putnam (1988): 442.

While Putnam only states that the nature of political institutions affects the win-set size of negotiations, Hiscox has developed this insight further concerning democratic states. Autocratic regimes, on the other hand, are not given much attention by Hiscox. In order to analyze the policies of actors like China in international negotiations, this should be developed further in the two-level model. Hiscox claims that autocratic states tend to have two main motives in international trade negotiations: Either they pursue liberal trade and investment policies in international negotiations based on the desires and the motives of the leadership - for instance to increase national economic out-put and thereby increase the leaderships wealth and power. Or they tend to pursue policies of trade protection in cases where the autocratic government is dependent on political support from small powerful groups that favor protection. The former is most relevant to the case of China, according to Hiscox.⁴⁰ In contrast, the grounded theory of the two-level model finds that authoritarianism does not seem to independently dictate the negotiations as one could intuitively expect.⁴¹ In order to develop this insight further, a consideration of which groups gives political backing to the leadership is necessary, as well as how interests are channeled in non-democratic regimes (section 2.5.1).

2.4.1 Electoral system

In democratic states, on the other hand, the different political institutions are given more consideration. In states with proportional representation and strong political parties, as is the case for Norway, Hiscox claims that groups based on narrow interests have less impact on policies, especially when the Government consists of a coalition of parties. They appeal to a national constituency and are less respondent to particularistic demands in elections etc.⁴² Still, the strong parties prioritize the preferences of their, often quite stable, core electoral base.⁴³ This implies that the party-political composition of the government in power affects which actors are active at the domestic table, as interest groups will expect the political parties to be loyal to the preferences of their electoral base.

Hiscox' argument on the importance of democratic political institutions is not supported by scholars who have applied the two-level model to several case studies. Their findings indicate that

⁴⁰ Hiscox (2008): 112-113

⁴¹ Evans, Jacobson & Putnam (1993): 410

⁴² Hiscox (2008): 113

⁴³ Hiscox (2008): 117

the question of whether or not the negotiating parties are democracies or autocracies does not seem to be crucial to determine policy outcome, as different interest groups have other channels to influence the level I game board in autocratic states.⁴⁴ In the grounded theory this was definitely found to be true in the study of ratification of international agreements in the Soviet Union.

2.4.2 Bureaucratic capture

In addition to electoral system (if any) and party structure, another political institution that must be considered is that of the bureaucratic agencies. They, of course, influence policy outcomes. According to Hiscox there is a big problem of what is termed “bureaucratic capture”, referring to the phenomenon that the bureaucracy tends to develop close ties to the sectors they are linked to. This means that they end up serving instead of regulating these sectors and interests.⁴⁵ Studies from the U.S. and Japan have shown that this is especially true for ministries and departments of commerce, as well as for agriculture: These are often operating as unapologetic advocates for their “clients”. The US International Trade Administration, located inside the Department of Commerce, is according to Hiscox, “renowned for having gone native.”⁴⁶ Both the US and Japanese ministries of trade and commerce are known to have made rulings based on the narrow interests of the respective national firms. In Norway, the Ministry of Foreign Affairs is negotiating multilateral trade and investment agreements through the WTO. But it is the Norwegian Ministry of Trade and Industry who negotiates Norwegian bilateral trade and investment agreements. According to Hiscox’ theorizing, it should be expected that the Norwegian TNCs have more influence on policy positions in bilateral than multilateral agreements due to this division of labor between the ministries. According to Hiscox trade reforms are more likely in bilateral than in multilateral negotiations as the actual benefits from entering an agreement with the partnering country is more specific and visible. The actual positive effects of entering into multilateral agreements through the WTO are more abstract.⁴⁷

According to Putnam the chief negotiator has considerable influence over the final result of the agreement. This negotiator will most often have some bias, and possible other personal motives.

⁴⁴ Evans, Jacobson & Putnam (1993): 414-415

⁴⁵ Hiscox (2008): 118

⁴⁶ Ibid.

⁴⁷ Hiscox (2008): 117

For instance to enhance her popularity, or to get an “excuse” for introducing unpopular policies, or just to pursue her own conception of national interests. The grounded theory of the two-level game finds that the chief negotiator is especially influential in terms of agenda-setting, and in defining the “national interest.”⁴⁸ In that context, it is important to be aware of which domestic coalition the chief negotiator is part of. She will most likely have a fixed investment in a certain pattern of policy positions and it will be important for her not to counter the interests of the supporting coalition. In other words, whether the allies are big business interests or trade union representatives is not unimportant.

2.4.3 Institutions of ratification

Ratification is understood in broad terms in Putnam’s theory, which means only that the agreement must be accepted at home, and that it must be “voted up or down” as a whole. This does not necessarily require a formal voting procedure, but it can do: Such as the formalized ratification procedure in the parliament as is the case for ratification in Norway. According to the model there are several levels of actual ratification among constituents in both states. Within institutions like political parties, trade unions and business interests groups. There is a *de facto* “ratification”, meaning that these institutions must decide whether or not to accept the agreement. At each level of ratification, cleavages, ratification procedures, side-payments and negotiator strategies must be considered, according to Putnam.⁴⁹ As such, the two-level game is really a multiple-level game.

Although ratification procedures vary, negotiators will ensure backing from constituents that could possibly stop ratification. In the US, for instance, an elaborate system of private sector committees is ensuring communication between level I negotiators and level II constituents. These are set up to minimize the risk of constituents opposing ratification.⁵⁰ In Norway and EFTA as well, the negotiators meet on a regular basis with the Consultative Committee of EFTA. This consists of trade unions and employers’ organizations in the separate EFTA countries. The negotiators also consult different interest groups in a more ad-hoc fashion. Still, according to Putnam the negotiators are often “badly misinformed” about domestic politics, both in their own home-country but especially the domestic politics on the opposing side.

⁴⁸ Evans, Jacobson & Putnam (1993): 403 - 405

⁴⁹ Putnam (1988): 448-450

⁵⁰ Ibid.

Another factor affecting possible blocking of ratification is the degree of discipline within the governing party or the governing coalition. Discipline increases the win-set, as forces inside the Government will not try to block ratification by building alliances with other parties or constituents.⁵¹

2.5 Power theory

The power relationship between the two actors at level I should be considered. The power relationship is important in order to analyze if it is the preferences of the negotiating partner, or the domestic constituents, that should be expected to influence Norwegian policy positions at the level I game board the most.

In international politics several forms of power are at play, and scholars studying international relations should be careful not to unconsciously privilege only the first dimension of power theories, those primarily attributed to Max Weber⁵² and Robert Dahl.⁵³ This is the main argument for Michael Barnett and Raymond Duvall to develop a taxonomy of power in international relations. They have developed a taxonomy with mutually exclusive and exhaustive distinctions of power, in an attempt to detach the concept of power from any theoretical school.⁵⁴ Although different theoretical schools accept different forms of power, this is meant to help for instance realist scholars identify also the more sophisticated forms of power that actors can pursue in the global bargaining society, in order to determine their fates. Most important to Barnett and Duvall, the taxonomy helps the scholar apply the power theory most relevant for the empirical problem being studied.

What is termed Compulsory Power in Barnett and Duvalls taxonomy, is the kind of power where an actor has control over the other partner in a direct interaction. This is of course relevant in a negotiation situation, where the parties have unequal resources, whether material or ideational, symbolic or normative. These resources can be used to pressure the other part in a bargain situation. In this case, resources obviously includes the fact that China holds an emerging market

⁵¹ Ibid.

⁵² Max Weber defines power as "the ability of an actor to realize his or her will in a social action, even against the will of other actors." Weber (1946)

⁵³ Robert Dahl's definition of power is that "A has power over B to the extent that he can get B to do something that B would not otherwise do." (Dahl (1957): 202-203

⁵⁴ Barnett and Duvall (2005): 43

economy of interest to the negotiating partner Norway, while Norway does not have a market nearly as important to the Chinese, looking at statistics of trade and investment flows between the parties. Also, there is an observable conflict of interest regarding the content of the agreement under negotiation.

Still, this theory of power will not give us the whole story. Institutional power, control through diffuse relations, in essence by indirectly controlling the conditions the other actor is operating under, is also relevant for this study. This also includes the classic power theory of Peter Bachrach and Morton Baratz of non-decisions, giving attention to the power of agenda setting, and which actors decides which issues are under consideration. For this study, examining a change in policy position, it is relevant to analyze which actors have put this question on the agenda of policy makers in the first place, e.g. specifying which areas are included in the Joint Feasibility Study. And, just as relevant, which actors were able to block this issue from the agenda of policymakers before the change of policy. In the grounded theory refining the two-level game of Putnam mentioned above, the issue of agenda-setting in trade deals is elaborated. The scholars find evidence that in trade issues, as opposed to security issues where the governments are usually the initiator, domestic constituency pressure plays an important role in initiating processes to achieve international agreements. While no universal rule, this is most emphasized in sector-specific trade cases.⁵⁵

The two above-mentioned forms of power are primarily focused on agency. The power theories primarily focused on structure are not included in this study. These imply that power is exercised through the constitution of other actor's identities, as opposed to controlling that actor. These types of power are termed Structural and Productive power in the taxonomy of Barnett and Duvall. This is not to exclude that such forms of power can play a role for the Norwegian change of policy, but it has been outside of the scope of this thesis to study them. For the empirical problem of interest in this study, the power of rational actors to influence the policy outcome is most relevant, either by having the most resources in the negotiation, or by keeping policy options of the agenda.

2.6 Defining the actors

For the purpose of drawing on comparisons with other current and former negotiations, e.g. EFTA-India, China-Australia and China-New Zealand, these actors and the degree to which they

⁵⁵ Evans, Jacobson & Putnam (1993): 404

are comparable should be identified. In the following section it will be argued that these actors are indeed comparable as they have comparable institutional models and positions in the global economy – the small OECD-countries on one side, and the large emerging economies on the other. In addition, transnational corporations will be categorized, identifying how these vary according to the institutional models of their home countries, and how this affects their motives to internationalize.

Rob van Tulder in his book "International Business-Society Management" sees society as a constant negotiation between three types of actors, namely the state, market actors and civil society. According to van Tulder it is a general and global trend, although sometimes over-stated, that the market actors are increasing their influence in the global bargaining society, at the cost of the state especially. This is led by four major developments, namely the rise of multinationals, the wave of mergers and acquisitions, increased financial insecurity and privatization of technology.⁵⁶ This negotiating society between state, market and civil society is most clearly seen on the international arena, since this level of society is characterized by fewer regulations and more issues are decided through negotiations. Although ideal types are presented, the state, market and civil society actors of course vary across different parts of the world, and typologies are presented according to the institutional models that characterize these actors.

2.6.1 China and the emerging economies

Within van Tulder's typology, China falls within the Asian business-statist institutional model, characterized by a pragmatic mixture of state involvement and "big business". This institutional model, for the sake of China, has also been termed "red capitalism". The largely informal and relationship-based ("guanxi") dynamics of these business-statist institutional models materializes at the state-marked interface, whereas civil society is relatively marginal.⁵⁷ The civil society actors primarily consist of so-called GONGO's, Government Organized NGO's (a self-contradictory term), like for instance the Chinese trade union, which is not independent from the Government.

In the bargain over foreign policy, apart from the business sector, the intellectual elite have become influential in recent years. While the Communist Party of China (CPC) until the mid-1990s was primarily discussing and deciding foreign policy internally in the party, think tanks on foreign policy have since the mid-1990s become increasingly influential, as the CPC is listening to

⁵⁶ Van Tulder (2006): 47

⁵⁷ Van Tulder (2006): 41

foreign policy experts from the academic world. As a consequence, the number of think tanks both inside and outside of the party structure has risen. There is not consensus among these think tanks, as they vary in their views on the opening up of the Chinese economy, from ultranationalist to neo-liberal ideologies.⁵⁸ In general, in analyzing Chinese foreign policy, there is not one power centre forming these policies, but various interests are competing to form the foreign policy, regional, sectoral and business interests, among others.⁵⁹ This has been termed “fragmented authoritarianism.”

China is experiencing a continued high economic growth. Much of this success has been attributed to Chinas gradual transition to a market economy (compared to the “shock-terapy” of the former Soviet countries).⁶⁰ For instance, foreign companies where only allowed entrance to China through joint ventures with Chinese corporations, until a law was passed in 1986 allowing Wholly Foreign Enterprises (WFE), (corporations with capital solely invested by foreign owners).⁶¹ Still, these foreign enterprises were restricted in various ways. This has to a large extent been abolished today. 44 % of foreign investments are now made through WFE’s, and it is expected that this form of investment will take over for Joint Ventures in the near future.⁶² Still, the majority of large Chinese corporations are state-owned, occupying more than three quarters of all relevant and strategic industries.⁶³

Institutional openness can be described as the degree of FDI-flows in and out of the state. In van Tulder’s typology, China is characterized as a Closed Economy, but moving towards the Inward Open category: Closed since the outward FDI stock as a percent of GDP is less than three percent, or “negligible” according to this typology, but with a “medium” level of inward FDI stock, categorized as between 15 and 40 percent of GDP in van Tuldres model. (China is ranging in the very lowest end of the scale according to UNCTADs World Investment Report 2010). This typology was presented in 2006 and is based on the 2003 UNCTAD World Investment

⁵⁸ Interview 09.05.2011

⁵⁹ Shambaugh (2011)

⁶⁰ Van Tulder (2006): 37

⁶¹ Gallagher and Shan (2009): 1.28-1.33

⁶² Ibid.

⁶³ Van Tulder (2006): 38

Report.⁶⁴ The Chinese “Go-abroad” strategy in recent years has led to a rapid increase in outward FDI stock as a percent of GDP, namely 4.9 percent in 2009.⁶⁵ This implies that China moves out of the company of primarily South-East Asian and Eastern European countries, to join countries such as the US, Italy, South Korea and Russia. Consequently, it is a clear trend that China is becoming a still more open economy, primarily Inward Open but also Outward Open. The closed economies, according to van Tulder, typically pursue a “go-it-alone” strategy in international politics.

According to van Tulder India falls within the same institutional model as China, namely the Asian business-statist model. Still, there is of course a big difference in the political institutions of the two countries, India being characterized as the world’s largest democracy. This, in turn, has consequences for the way domestic interest are expected to influence foreign policy. Civil society in India is much more independent and influential in India than in China. Also, India is a late-comer in liberalizing the economy.⁶⁶ This means that the degree of outward openness of India is smaller than that of both China as well as emerging economy Brazil, meaning that Indian TNCs are not investing abroad to the same degree as the corporations of the other emerging economies. Still, this trend is changing fast. From 2005/2006 the foreign direct investments of Indian TNCs have increased tremendously, and Indian outward FDI is rapidly catching up with both China and Brazil (the two emerging economies with the highest level of outward FDI).⁶⁷

2.6.2 Norway and the small open economies

Norway falls within the corporatist/social-democratic model. Norway is characterized as a small country with an open economy, distributing both the gains and losses of the liberalization of the economy internally, through corporatism and a strong welfare state. There is a high degree of consensus among the constituents on the open economy, and the adjustment of the economy to the global economy for instance through free trade agreements. This also means that both the marked, state and civil society has about equal importance and influence in the internal bargain on distributing these gains and losses.⁶⁸ In relation to the bargain over trade politics as well, the

⁶⁴ Van Tulder (2006): 32, Figure 2.1

⁶⁵ UNCTAD (2010): Country Fact Sheets, China

⁶⁶ Natraj (2002)

⁶⁷ See for instance table 4, based on data from the Reserve Bank of India, in Saikia (2009).

⁶⁸ Katzenstein (1985), Van Tulder (2006): 31 - 40

Norwegian Parliament is generally included in the decisions of Norwegian positions in WTO negotiations, as well as the more general definition of national interests in trade policies.⁶⁹

According to institutional openness, Norway is characterized as an “Outward Open” economy, meaning that it has more outward than inward FDI. Few countries fall within this category, and these are almost always developing countries, which are also home to large TNCs, such as Statoil and Telenor in the case of Norway. The Outward Open economies then “suffer”, in van Tulders terms, from a great amount of investment leakage, meaning that productive capital is mainly invested abroad.⁷⁰

The EFTA-partners fall within the same institutional model as Norway. They are small countries with open economies and a corporatist model, and a strong welfare state that redistributes both gains and losses of the open economy. This is especially true for EFTA-members Switzerland and Iceland. The last member, Liechtenstein, falls in a slightly different category as a consequence of its nature as a tax haven, holding a much higher level of both inward and outward FDI. As an institutional model the small open economies have proven successful, combining small populations with high GDP pr Capita and high employment rates concentrated in few and large corporations.⁷¹ The corporatist model ensures that all relevant actors (firms, state and civil society) have permanent representation in the quite centralized bargain.

Since Chinese FTA negotiations with New Zealand and Australia are also given attention in this study, their institutional model is relevant as well. New Zealand and Australia are Outward Open economies, like Norway and the EFTA-countries. Yet, they do not hold a similar institutional model. They fall within the liberal model of the US and the Anglo-Saxon countries, implying that they are not corporatist but largely dominated by the business sector, with a clear separation of power between the three spheres of market, state and civil society.⁷² As such, these countries have a shareholder-capitalist system (as opposed to a stakeholder-capitalism), characterized by a

⁶⁹ Langhelle and Rommetveit (2004)

⁷⁰ Van Tulder (2006): 31 - 40

⁷¹ Ibid.

⁷² Ibid.

low degree of state-owned firms, a short-term orientation in doing business, a rule-based society and competitive business-culture.⁷³

2.6.3 The Transnational Corporations

The internationalization of corporations, means, on general, that they can less easily be regulated by national social and political groupings. Still, in this thesis, the term Transnational Corporation (TNC) should not be understood as implying that the corporations that are examined are not Norwegian. The term is only used to describe Norwegian corporations operating also in foreign countries. In analyzing the trend of internationalization and the rise of the TNCs, three main motives should be considered.⁷⁴ Firstly, the “Intrinsic” motive, meaning the locational advantage the corporations can gain for instance from producing where wages are cheapest, where resources are located, or where transaction costs are lowest, in general. Second, TNCs can have “Extrinsic” motives, which are more political than the intrinsic motives, meaning that the TNCs can pressure their home country by escaping (or threaten to escape) home country regulations, or/and move their business to host-countries with more business-friendly policies. Thirdly, TNCs may have mixed or sector intrinsic motives, meaning that the market structure and intensity of competition in their sector is the main motive for internationalization. One sectoral dynamic is that of the bandwagon or herding effects, meaning that firms operating in oligopolistic⁷⁵ sectors have a tendency to copy each others behavior. China is a good example in this case, and Van Tulder claims that “the choice of China as the major recipient of FDI in the 1990s reveals a major bandwagon effect.”⁷⁶ Market dynamism in the global economy comes primarily from the financial sector, pharmaceuticals, telecommunications, oil and media, according to van Tulder.⁷⁷ Empirically, the main motive for internationalization seems to be intrinsic, especially in order to gain market access or access to resources and assets.⁷⁸ Still, motives vary according to the type of Transnational Corporation, which is again linked to the home country of the TNC, as well as sector.

⁷³ Hall & Soskice (2001)

⁷⁴ Van Tulder (2006): 47-50

⁷⁵ An oligopoly can be defined as a market dominated by a small number of participant, who are able to collectively exert control over supply and market prices.

⁷⁶ Van Tulder (2006): 49

⁷⁷ Van Tulder (2006): 90

⁷⁸ UNCTAD (2000): 8-10

Chinese corporations are primarily state owned or state controlled. This, in turn, means that their internationalism strategy is largely that of multi-domestic acquisition (taking over other state-owned companies).⁷⁹ They are characterized by having access to financing from their home-government, meaning that they have an alternative to the capital market as a source of capital. They are also often hampered by host country opposition because of fears of foreign domination or accusations of unfair competition. Their motives for internationalization are mainly extrinsic, according to van Tulder.

On the other hand, Norwegian corporations primarily fall into the category of For-profit public companies (listed on the stock exchange), and although the state is a large owner in several of the large Norwegian TNCs, the state is a passive owner. This type of corporation primarily internationalizes through mergers and acquisitions, and their motives are primarily mixed/sector intrinsic or extrinsic. In general they are largely capital intensive, and resource and market seeking.⁸⁰

2.7 Summarizing three levels of theoretical explanation

In order to discuss why Norway has changed its policy on bilateral investment agreements, three analytical levels of explanation can be derived from this chapter. These different levels of analysis are paired with theoretical assumptions of which actors influence policy at each level, and how. The three levels of explanations can be summarized as follows:

2.7.1 Domestic level

First, domestically in Norway, with a strong corporatist institutional model, it can be expected that certain business interests would request bilateral investment agreements. These businesses are expected to have sector-specific motives of internationalization. Investment agreements are most relevant for businesses operating in sectors with capital-intensive investments and large “sunk costs,”⁸¹ which are also investing in the emerging market economies today, or planning to do so in the future. Corporations in certain sectors may also pursue bilateral investment agreements not because of their intrinsic motives, but as a bandwagon phenomenon, fearing that their international competitors will get advantages in global competition when their home-countries are entering into bilateral investment agreements. The corporate interests are expected

⁷⁹ Van Tulder (2006): 54-55, table 3.2

⁸⁰ Ibid.

⁸¹ Past costs that cannot be recovered

to have much influence of the positions of the bureaucracy negotiating the agreements, so-called “bureaucratic capture”. Norwegian constituents are expected to hold heterogeneous interest on the question of regulating inward FDI. This is also true for capital owners and workers inside industries. Hence, the trade unions are expected to hold defensive interests on the issue of investment agreements. Party-political composition in the government, as well as the level of secrecy in trade and investment negotiations, are expected to influence which defensive interests are active at the domestic game board.

2.7.2 Bilateral level

While the domestic constituents could possibly be a central actor to explain the change of Norwegian policy on bilateral investment agreements, the negotiating partner could also be a central actor, by demanding this change in policy. With emerging market economies both attracting FDI and investing abroad, the rise of bilateral investment agreements may also be a development pushed by the emerging market economies and the changing geopolitical power-scene. In China the business sector as well as the intellectual elite is expected to be influential on government policy in trade and investment negotiations. Civil society is supposedly not active at the domestic game board. The intellectual elites and the Chinese government are fragmented in their views on foreign policy. The business sector is expected to have interests in investing abroad, while some actors in the government and intellectual elites hold defensive interests.

2.7.3 Systemic level

A third possible level of explanation is that it is neither the changed interests of actors at the level II and level I game board that are primarily explaining the change of policy. In stead, this could be a case of reverberation, meaning that it is the pressure of systemic changes and international actors that best explain the recent policy change. This could be actual pressure from partners in the EFTA partnership. It is also possible that the Norwegian policy change is not so much a result of direct international pressure, but that the Norwegian government is jumping a bandwagon and following an international trend in order not to be left behind in a world of increased bilateralism.

Chapter 3: Approach and methodology

The main approach of this study is an embedded case study of the ongoing negotiations for a bilateral trade and investment agreement between Norway and China. It is embedded in the sense that the study draws on empirical insights from the wider global phenomenon of bilateral trade and investment agreements. In doing so, it also includes comparative elements, by including similar relationships. In that respect, the negotiations for a bilateral trade and investment agreement with India is given the most attention, as well as bilateral relationships including Brazil, New Zealand and Australia. This chapter discusses the most important methodological issues regarding the validity and reliability of the chosen research design. It also discusses the challenges of conducting research in a field surrounded by political controversy and secrecy, and the implications of limitations on access to relevant documents and informants.

3.1. The case study

The main case studied is the ongoing negotiations between Norway and China for a bilateral trade and investment agreement (FTA). The Norway - China negotiations can be studied as a *case of* different phenomena. In this study, this is primarily studied against the backdrop of a wave of bilateral trade and investment agreements which governments have embarked upon in recent years. Thus, the negotiations are seen as a case within this larger universe of bilateral agreements. Within this broad class of bilateral agreements, it displays with particular clarity the dynamic between a developed economy and an emerging power, where the ambition is to increase foreign direct investments.

In the study of the “new” Norwegian policy on bilateral investment agreements there are not a large number of cases to choose from. Since Norway has abstained from negotiating such agreements since the mid-1990s, and the Norwegian government has only recently opened up for such negotiations with four states (China, India, Russia and Ukraine), the object of interest is a rare phenomenon. This means that there are a large number of bilateral relationships including Norway with no observable change in BIT policy, and only a few *with* a change in policy. Hence, the four cases with a change in policy are of great interest to understand the trend of bilateralism in investment agreements, since they “exemplify all the variation that we have at our disposal.”⁸² Negotiations with China (as well as India) is an important case due to the particular weight it

⁸² Gerring (2007): 56.

yields on any conclusions of a general analysis of Norwegian bilateral investment agreements as such. China is notably a primary example of the current shift in global political and economic power. Negotiations with China (and with India) are thus an important case in its own right. Meanwhile, it can also be argued that it is particularly influential to the theoretical phenomenon of interest; what Gerring calls an *influential* case.⁸³

The dependent variable of this study is the Norwegian policy on bilateral investment agreements. This is operationalized as the manifest policy as defined in constitutive government declarations in 2005 and 2009 (Soria Moria I and Soria Moria II respectively). In the latter, the Norwegian government opens up for the negotiation of investment protection. The independent variables of main interest are the Norwegian domestic corporate (and defensive) interests, as well as the BIT and FTA policies of the emerging economies. As described earlier, there is a strong international trend towards negotiating bilateral investment agreements. Hence, an important independent variable is that of the bandwagon-effect, i.e. to what extent the Norwegian government engages in bilateral negotiations of investment agreements with China and other emerging economies in order not to be left behind on an important international trend. Still, due to the limits to data-access (it has not been possible to gather much data on the motivation of the Government to negotiate these agreements with China, see section 3.3.1) this is only examined in a more general manner.

3.1.1 Small N and big debate

In opposition to the traditional understanding of the case study, also referred as the small-N study, the potential for single case studies to generate general knowledge has been elaborated in recent years. At times overlapping with conflicting philosophies of science, the debate on the scientific value and the advantages and limitations of the case study is wide. In the positivistic tradition, the case study is seen as having limited potential for making wider general claims outside of the actual case studied. For instance, Lijpharts classic contribution from 1971⁸⁴ ranged the single-N study as the research design with the least academic value because of this claim. A more recent contribution is that of Barbara Geddes, concerned with the problem that there are more factors possibly explaining the dependent variable than there are cases studied. This builds on a rather conservative understanding of the case study, in Barbara Geddes definition as “a unit

⁸³ Gerring (2007): 108 – 110

⁸⁴ Lijphart (1971)

within which each variable measured takes on only one value or is classified in only one category.”⁸⁵

While it can be claimed that the debate on making the case study methodology more “scientific” is unfruitful, since it is based on ontological and epistemological differences that are difficult to overcome, some are concerned with bridge-building, meaning that the concerns of for instance Lijphart and Geddes should be taken into account in developing a good methodological framework around the case study. Thus, while acknowledging that a single case cannot generate general knowledge with a defined level of certainty, there are inherent strengths in the “thick” study of single cases, namely in developing hypothesis and in term validity (operationalization) and internal validity. In essence, to understand complex processes and causal mechanisms.⁸⁶ For this purpose, while not overlooking the fact that there is an actual and practical trade-off in every research design between the deep and the broad study, and in contrast to the above-mentioned definition by Barbara Geddes, John Gerring argues that the case study is dynamic. Therefore it allows the researcher to study variation, spatial and in time, inside of a few or even a single case studied. Single cases do not provide “only one value” or data point on each variable, but allow for the study of causal processes by studying variation across time and/or space.⁸⁷

3.1.2 Dynamic comparisons

Studying causality requires variation, either within or across cases. Accordingly, it is necessary to allow the assumed causal variables to vary. In this study, such variation is both longitudinal as well as spatial: Longitudinal in the sense that the relationship between China and Norway has changed over time, and spatial in the sense that different actors and bilateral relationships are studied, as (among others) the FTA negotiations with India. According to a matrix developed by John Gerring, this allows me too undertake a dynamic comparison.

⁸⁵ Geddes (2003): 96.

⁸⁶ Yin (2003), Andersen (1997), Gerring (2004), Gering (2007)

⁸⁷ Gerring (2007): 151 - 157

In this matrix, the “Treatment” is the case with intervention, the China-Norway relationship. The outcome (Y) is the Norwegian BIT policy, while the main independent variables (X) of interest are the Norwegian domestic corporate interests (X1) and the interests of the rising economic and political powers (the emerging economies) (X2). An additional independent variable, the bandwagon effect and the general trend towards bilateralism in global trade and investment politics, could be included as X3. The

		t1	t2
Treatment	Y	-	?
	X1	-	+
	X2	-	-
Control	Y	-	? -
	X1	-	-
	X2	-	-

Matrix of a “dynamic comparison”.⁸⁸

longitudinal comparison is conducted by analyzing the *change* in Norwegian BIT policy towards China, i.e. before (t1) and after (t2) the intervention. The intervention should be understood as changes in the independent variables, essentially changes in the interests of the Norwegian business sector towards China, changes in Chinese policy on trade and investment agreements, and changes in the international trends on investment agreements. The spatial comparison, the “Control”-part of the matrix, is a similar case but without the intervention, i.e. a study of a change in Norwegian BIT policy in a similar bilateral relationship without a similar change in the independent variables. For this purpose: Norwegian corporate interests towards India and Indian BIT policy. Since the FTA with India is being negotiated as part of EFTA, the global picture of bilateralism in investment policy can be included also.

The longitudinal comparison, changes over time in the relationship between Norway and China, is a more robust comparison than the spatial comparison, the inclusion of other bilateral relationships. The longitudinal comparison holds the advantage of comparing the same actors, meaning that spurious effects, the chance that other independent variables are primarily influencing the Norwegian BIT policy, are to a large extent held constant (in analytical terms). In other words, the chance that other independent variables than those identified here are determining Norwegian BIT policy is greater in the comparison between China and India, than in the comparison of changes in the Norway-China relationship. Although China and India are characterized within the same institutional model, there are significant differences between them. Another concern with the spatial comparison is that of comparing actors in a multi-level analysis.

⁸⁸ Gerring (2007): 155

This is primarily a concern with the comparisons between Norway and EFTA in this study, as it should be kept in mind that EFTA holds an extra layer of bargaining, the internal bargaining between the EFTA member states of the common positions towards the negotiating partner. Still, as both Norway and the EFTA states fall within the same institutional model of small open economies some comparison is feasible. This can widen the empirical evidence for analyzing Norwegian BIT policy towards China, and to make assumptions for the possible empirical range of the study, i.e. to which extent the Norwegian BIT policy towards India has changed for the same reasons as it has changed towards China.

The language of this matrix developed by Gerring is highly “positivistic”, in the sense that it uses the methodological language and terms known primarily from those methodologies that are viewed as having the most scientific value according to Lijphart (primarily that of the statistical large-N study). Of course, which terms are used does not add to the reliability and validity of a study, or make it more “scientific”. Still, this matrix serves as an important tool to improve the analytical clarity of this case study, being concerned with understanding the processes and causal mechanisms that has lead to a change in Norwegian BIT policy. It is not possible to distinguish one specific point in time of intervention in the China - Norway relationship. The intervention may be “manipulated or natural, sudden or slow, major or minuscule, dichotomous or continuous, and causal effects may be immediate or lagged.”⁸⁹ In other words, it includes any sort of change in the domestic corporate interests towards China or India, and any sort of change in the interests of emerging economies in pursuing bilateral investment agreements.

A concern within this research design is the risk of selecting cases based on their “score” on the dependent variable. The bilateral relationships that are examined consist of states that are negotiating bilateral investment agreements. This is especially problematic since as a result, it will not be tested if cases with a different score on the dependent variable could also have the same scores on the independent variables. E.g., could there be a bilateral relationship with both domestic corporate interests and the negotiating partner pushing for a policy change, but without the Government changing their policy? There is no easy way out of this problem without extending the number of cases considerably. In part, however, the study of variation over time serves to strengthen the causal argument. Moreover, with regard to variation *between* cases, measures could also be made. The relationship of Norway and Brazil is briefly considered in the

⁸⁹ Gerring (2007): 154 - 155

study, i.e. a bilateral relationship with an important emerging economy, which is not included in the Norwegian policy change on investment agreements.

3.2 Theoretical ambition

In line with the arguments above, there are a wide range of possible theoretical ambitions of a case study, depending on the research design. This study is primarily concerned with the empirical problem, that is, what interests and actors are the driving forces behind the current shift of Norwegian policy on investment agreements. This is a new development, which has not yet been subject to much research. Hence, theory is primarily applied to interpret and structure the case studied, in order to gain new insight on an important trend in Norwegian and global economic policy. In addition, it is also an aim of this study to refine the theory of Robert Putnam of the multi-level game, adding theoretical insights of how and through which channels the domestic and international game-boards are influenced. Especially in negotiations between small open states and emerging market economies, with a primary focus on corporate interests and their channels of influence. The study therefore has what Lijphart refers to as a hypothesis-generating ambition, but it is also interpretative in leaning upon established theory (Putnam) which is not in itself subject to testing.⁹⁰

3.3 Data

The primary sources of empirical data for this thesis are interviews with Norwegian corporations and interest groups, and secondary literature on emerging markets investment agreement policies.

In-depth interviews have been conducted with informants in Norwegian transnational corporations Statoil, Telenor, Hydro and Orkla, as well as the Confederation of Norwegian Enterprise (NHO), the Norwegian Confederation of Trade Unions (LO) and the Ministry of Trade and Industry (see list of interviews in appendix 1). The interview objects are a non-random sample, chosen as the primary informants in the corporations and interest groups who hold the highest interest in the object of interest. Accordingly, they should not be seen as representing the entire business sector they are part of. Also their positions in the corporations vary, as they are chosen on the basis of their knowledge and involvement both in investment strategies in emerging economies as well as the issue of bilateral investment agreements. As a result, the impact of their position in the organization on their statements is considered throughout the analysis. In-depth interviews have been prioritized at the cost of the quantity of interviews.

⁹⁰ Lijphart (1971)

Additionally, primary written sources are documents in the form of written letters and written answers to a public hearing on investment agreements, as well as former investment agreements. The secondary literature has especially been on Chinese foreign policy think tanks and analysts, as well as reviews of the former BITs and FTAs that have been signed by China and the other emerging economies so far.

3.3.1 Data-triangulation and secrecy

Important data has not been available, as access to written documents on Norwegian policies has been denied, and relevant officials have not been willing to be interviewed about the negotiations with China. While some information has been leaked through documents and informal communications, this information is not in the public domain. There is a general tradition of secrecy in Norwegian bilateral trade and investment policy, a trend that has possibly been strengthened in the FTA negotiations with China due to diplomatic differences stemming from controversies surrounding the Nobel Peace Prize in 2010. The limited access to data has implications for the reliability of the study, as the possibility to triangulate data has been limited.

In general, Norwegian bilateral trade and investment negotiations are not debated in the parliament, unlike for instance the US congress and EU parliament debates on bilateral trade agreements.⁹¹ This means that it is impossible for both the general public and researchers to collect data from such debates on the incentives for negotiating such agreements. Without debate in the parliament, another source of data are interviews with civil servants negotiating these agreements, as well as political leadership in the Ministry of Trade and Industry. Still, this has not been a fruitful strategy, since the negotiators and political leadership have declined to give information regarding ongoing negotiations. As another attempt to gain access to data, a request for access to a document giving information on the Norwegian positions on investment agreement, the Norwegian proposal for the investment chapter of the China-Norway FTA, was filed. This was denied by the Ministry of Trade and Industry. A complaint on this decision was sent to the Ministry on January 4th, but denied based on article 20b of the Norwegian Freedom of Information act. Article 20b includes the concern for Norwegian foreign policy interest, giving that information is received under the condition of, or that it is normal practice that, such information is not made public.⁹² This was sustained by the Privy Council – Norway's Council of

⁹¹ See for instance a study drawing on debates in these foras: Hveem (2010)

⁹² In Norwegian, the text of article 20B is as follows: "Det kan gjerast unntak frå innsyn for opplysningar når det er påkravd av omsyn til Noregs utanrikspolitiske interesser dersom opplysningane er mottekne under føresetnad av eller det følgjer av fast praksis at dei ikkje skal offentleggjerast"

State - on 8 April⁹³ (See the complaint filed on 24 January 2011 in appendix 2, the answer from the Ministry of Trade and Industry of 8 February 2011 in appendix 3, as well as a letter from the treatment in the Privy Council in appendix 4 (with a new justification, founding the refusal on article 20c of the Freedom of Information Act).

Through early informal interviews and telephone conversations with civil servants in the Ministry of Trade and Industry, expectations were given of access to interviews with the persons negotiating the investment agreements with China, as well as other relevant persons in the ministry. This changed over time, and it was stated that it was not possible to get interviews concerning the negotiations on investments, as this was a “tricky” issue. There could be several reasons for such a shift. First, in December 2010 the Norwegian Nobel Peace Prize Committee awarded the Chinese political dissident Liu Xiaobo with the Nobel Peace Prize. This led to diplomatic sanctions against Norway, from Chinese authorities. This also had implications for the ongoing negotiations. The 9th round of negotiations, which was originally scheduled for December 2010, was postponed. A second possible explanation is that the specific issue of investment protection is one of the more controversial issues in the negotiations, in a domestic Norwegian context. The model agreement from 2008 was shelved due to such controversy, and developmental NGOs campaigned against the model agreement. It is to a large extent the same civil servants that worked out this model agreement that are negotiating and formulating the Norwegian proposal for an investment chapter in the negotiations with China⁹⁴ (see also section 2.2.2 on the incentives for secrecy in trade negotiations in general, and in highly politicized negotiations specifically). Still, a civil servant did agree to participate in an interview on the processes surrounding the proposal of a model agreement, as long as it did not include processes leading up to the negotiations with China.

⁹³ Offisielt fra Statsråd (8. april 2011)

⁹⁴ This possible explanation could have been intensified by the fact that I, in December 2010 wrote a critical chronicle about the negotiations with China for investment protection agreements, and the fact that the model agreement that was shelved due to controversy could now be introduced “through the back door” and without democratic debate in the bilateral free trade agreements (Ekeberg 2010). This was published in a Norwegian national newspaper approximately at the same time as the Nobel peace prize was awarded (not intentionally). This chronicle could possibly have been read by the civil servants I was hoping to interview, leaving them hesitant to share information. As a matter of form, it should be informed that I previously held the position of chair of the NGO Attac, and was also the signatory of this organizations reply to the public hearing on the model BIT in 2008. While this may be somewhat more decisive in a more politicized framework, this is certainly not expected to be the reason for the limited data access, as this holds a wider explanation in Norwegian traditions in bilateral trade and investment policy.

3.3.2 Interviewing elites and experts

The key informants interviewed in this study include elites as well as experts, in the way that they either hold high ranking positions in large multinational corporations and interest organizations, or are key experts on the issue of interest, or both. While expert and elite interviews are often treated as synonyms, the distinction of the two is not unimportant. It has consequences for the utilization of the data, and the source criticism it should be subject to.⁹⁵ The elite interview is to a larger extent used in order to gain insight on the personal perceptions and interpretations of different societal elites, in light of the power they possess. The expert interview (these experts are often placed in the mid-level of the hierarchy in the organizations or institutions) is primarily a source of more factual and technical information, on which the informant is an expert.

It is the researcher who decides if the informants (and their statements) are treated as elites or experts. Since the informants in this study is chosen based both on their high ranking positions in the organizations they represent, as well as their expertise on the issue of interest, many of them can not be rigorously divided into the two categories. Still, in the analysis their statements should be analyzed according to whether or not their personal expressions and opinions can be influential on the Norwegian policy of investment agreements, or if their statements can be used as factual information. Some of the informants clearly fit into both categories, like the corporate managers responsible for government relations/political affairs working on the issue of trade agreements with emerging economies (for instance, the informants in Telenor, Orkla and the NHO). Others should primarily be seen as experts, for instance the analysts on business strategies in emerging economies, and political affairs and trade and investment agreements (for instance, the informants in Statoil, Hydro and the NHD).

In conducting interviews, several strategies for asking good questions can be considered. For the purpose of this study, the open-ended questions are a good strategy, for several reasons. Primarily, the Norwegian change of BIT policy towards emerging economies is a current development, and for that reason there is not much prior research done on the issue. This makes it harder to define close-ended questions with a limited alternative of responses. Such a strategy would have limited the knowledge generated from the interviews.⁹⁶ In addition, open-ended questions improve the internal validity of the study, since the informants can organize their

⁹⁵ Bogner, Littig & Menz (2009)

⁹⁶ Aberbach (2002): 674

answers according to their own framework.⁹⁷ Also, elite and expert informants are often reluctant to answer close-ended questions, especially when many of them hold similar (or identical) degrees in higher education of the researcher as is the case in this study. This is both because they prefer to formulate and explain their views independently, and because the close-ended questions will often result in questions or debate on methodological concerns, and why the researcher has chosen certain categories etc.⁹⁸

Joel Aberbach and Bert Rockman have studied the political thinking of American administrators and members of the US Congress. They encourage researchers to fend off questions from elite informants on your hypotheses and research design until the interview has ended, in order to prevent “contamination of the respondent”⁹⁹. Although an important concern, the opposite experience was drawn in this study. Since the field of study is controversial, some of the informants seemed to be concerned about what I as a researcher was looking for, and why they were chosen as a respondent. Giving a brief overview of my research project, both the main research question and the type of informants I had made interview arrangements with, made the respondent more relaxed and open in the interview situation, to my experience.

3.3.3 Source criticism

All data, interviews, primary written sources and secondary literature, must be subject to source criticism. In analyzing written and oral data from interest groups, it is evident that the “inner” source criticism should be focused on the “tendency”¹⁰⁰ of the sources, meaning their motives, interests and biases in presenting the “truth” in a specific way. These interest groups, in their very definition, have an interest in the subject of analysis. Their statements are both normative and descriptive, about both the past and the future, and these different categories of statements serve as an important methodological background for the analysis of each of the statements – whether they are analyzed as facts or as opinions. As noted above, the analytical distinction between elite statements and expert statements is relevant in this source criticism.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Kjeldstadli (1999): 180

3.4 Validity and reliability concerns

There is a trade-off between external and internal validity,¹⁰¹ in whether to study a phenomenon is breadth or in depth, to know more about less or less about more. Some claim that there is an incentive for researchers conducting case studies based on elite and expert interviewing to include more cases at the expense of doing more detailed studies. This is because the “error term” in interviewing is not visible to others than the researcher herself, while including more cases and conducting a comparative study with more “N’s” is visible to all.¹⁰² This gives the study more “scientific value” in the more positivistic schools of political science. In general, the in-depth analysis of one or a few single cases improves the internal validity of a study, meaning that the causality, the reason for the correlation between the independent and the dependent variable, can be estimated with much more certainty than in the large-N study.

This study is primarily a thick study of the relationship between Norway and China in negotiating investment agreements, and its strength lies in the internal validity of this study, i.e. the depth of which the processes and interests influencing Norwegian policy are examined. Other cases are included primarily to shed light on and strengthen the findings of the processes and mechanisms in this relationship. Thus, these other cases studied are “thin”, in the way that in this trade-off between thick and thin studies, it has not been in anyway attempted to achieve the same level of understanding of the processes and interests in relationships with other emerging economies, primarily those of India and Brazil. In that respect, it should be noted that this study is not a comparative study as such, but an embedded case study of the Norway-China relationship with comparative elements.

Thus, the external validity, the representativeness between sample and population, is not the strength of this study. Although the cross-case research design has a stronger external validity than the single case study, it is difficult to conclude with much certainty that the bilateral relationship between Norway and China can give direct insight to the causality of other bilateral relationships, between other actors. None the less, analytical generalizations can be made, to a theoretically constructed population. This is what Alexander George and Andrew Bennet have called “typological theory”, meaning that the study of the Sino-Norwegian relationship can give useful insights in relationships between actors with similar institutional models, and similar combinations of values on independent variables. In other words, the Sino-Norwegian

¹⁰¹ Gerring (2007): 43

¹⁰² Berry (2002): 680

negotiations can be generalized to a bilateral relationship between a small OECD-state with an open economy and a corporatist institutional model, and a large developmental state with a business-statist institutional model and a high economic growth rate and emerging market economy. The more similar combination of independent variables, the more analytical relevance, while even relationships with less similarity can draw on some typological relevance.

While the concerns with reliability of the interview data is partly treated above, the reliability of the written data used should be reviewed as well. The written documents that have been studied are publicly available, with one exception (a leaked internal memo between the parties of the Norwegian coalition government). Most interviews are recorded on tape. This improves reliability because it has been possible to listen to the interviews several times, minimizing the risk of incidental errors stemming from bad notes etc. Direct and indirect quotes have been reviewed by the informants. Some information comes from informal and personal communication with informants that are not made known in this study. This has an impact on the reliability of this information, as their statements can not be checked by other researchers. Still, these informants have only been sources to factual information (meaning that the source of the information is not crucial).

The secondary literature on Chinese BIT agreements and FTA policy relevant to the FTA negotiations between China and Norway is limited, due to the fact that the change in Norwegian BIT policy is a very new phenomenon, and the fact that the FTA negotiations with China are ongoing. Academically, from a former period of bilateralism in trade and investment agreements also including Norway, literature exists, but since then the scope of the agreements has increased tremendously, and they are not readily comparable. Although not without important exceptions, much of the newer literature seems to focus mostly on the effects of the new wave of bilateralism on the multilateral trade and investment regimes. They are often not looking into the actual content of the newer agreements, and the economic interests initiating these agreements, or the way these agreements are formed.¹⁰³

This means that this study gives much weight to a few thorough publications in the analysis of Chinese BIT and FTA-policy,¹⁰⁴ implying that it is vulnerable to biases or errors in these publications. Hence, these studies should be subject to extra attention. Due to the language

¹⁰³ Heydon and Woolcock (2009), p. 211-220

¹⁰⁴ These are primarily: Gallagher and Shan (2009) and Yang (2009)

barrier, it has not been possible to go to the primary source in the analysis of statements from Chinese foreign policy think tanks. It has only been possible to read publications in English where the statements of these think tanks have been examined.

3.5 Chapter summary

The main approach in this thesis is an embedded case study of the FTA negotiations between Norway and China, studied against a backdrop of bilateral investment agreements between developed states and emerging market economies. The Norwegian BIT policy is operationalized as the manifest policy change in the Government declaration, and the primary independent variables studied is domestic corporate interests and the BIT and FTA policy of the negotiating partner. A general tradition of secrecy in Norwegian trade and investment policy, and the fact that investment agreements in general are politically controversial, limits the possibilities of data triangulation, and hence the reliability of this study. The study is primarily a thick in-depth study of a single case. Still, in order to get a better understanding of the processes and interests influencing the Norwegian policy change on BIT policy, other bilateral relationships are included. The ongoing FTA negotiations with India are given most weight in that respect, while also including general empirical evidence on the development in international BIT policy, in order to strengthen both the validity and reliability of the case study.

Chapter 4: Offensive interests in Norway

During the last decade, foreign direct investments (FDI) have taken over a large share of the global economy. During the same period, emerging economies have taken over a still larger share of these FDI flows, and developing and transition economies now account for nearly half of world-total FDI inflows.¹⁰⁵ This implies that still more corporations invest in the emerging economies. The aim of this chapter is to map which business sectors in Norway hold offensive interests in improving the access to investments in the emerging economies, especially China, based on interviews with key informants in Norwegian corporations on their current and future investment strategies. The second part of the chapter discusses whether or not these interests' perception of the regulatory framework of China implies that agreements protecting their investments are needed, and whether or not the corporations see BITs as a relevant tool to actually protect investments. Finally, the chapter engages in a discussion of through which channels these interests are transformed into public policy.

4.1 Mapping sector interests on investments

As described in the analytical framework the Norwegian TNCs are expected to primarily have sector intrinsic motives for their internationalization strategies, and they are mainly seeking access to markets and resources through mergers and acquisitions with local corporations (see section 2.5.3). According to the Joint Feasibility Study conducted by Chinese and Norwegian ministries of trade, Norwegian investments in China is primarily relevant in sectors such as the energy and environment sector, oil and gas, the maritime sector and the processing industry.¹⁰⁶¹⁰⁷

In general, Norwegian investments in China are limited compared to the volume of trade between the two countries, with a total of 35 – 40 Norwegian production companies established in China as of December 2007.¹⁰⁸ According to the trade director in the Norwegian Confederation of Enterprise (NHO), interviewed for this study, there are several reasons that

¹⁰⁵ UNCTAD (2010): 3

¹⁰⁶ NHD (N.D): 72

¹⁰⁷ In addition, the Norwegian petroleum fund, the Government Pension Fund-Global, has large portfolio investments in China, with investments in 89 Chinese corporations listed in China in 2007. The Fund recently opened up an office in Shanghai, and has a strategy to expand portfolio investments in China.

¹⁰⁸ Joint Feasibility study (N.D): 72

Norwegian corporations have not been very active in investing in China. First, the Norwegian industry structure largely consists of corporations delivering intermediate goods to other industries. Second, China has been cautious in opening up their economy, and relevant sectors have been closed for foreign investment.¹⁰⁹ According to the same informant, Norwegian corporations are investing more in emerging economy Brazil than in China. This is due to the fact that Brazil has opened up its oil industry to foreign companies, implying that the Norwegian off-shore industry will now increase their investments in the country. Several interviewed informant in the corporations confirm this picture, and hold strategies to invest in Brazil.¹¹⁰

4.1.1 Chinese Shale gas and hardened competition for resources

In general (as described in section 2.5.3), among the main sectors that should be expected to drive the globalization of the Norwegian economy is telecom and oil. In the interviews with informants in Statoil and Telenor conducted in this study, it is found that access to markets and resources in the emerging economies is in deed important to both these corporations. Statoil has been investing in China since the 1980s. In the South China Sea Statoil has been running an off shore oilfield, the so-called Lufeng field, in a joint venture with Chinese corporation CNOOC, China National Offshore Oil Corporation, with Statoil as the main operator. This oilfield was closed in 2009, five years after the expected time of closure. In addition Statoil is cooperating with Chinese corporations abroad, with above-mentioned CNOOC in the Gulf of Mexico, and with Sinochem in the Peregrino field of Brazil.¹¹¹

While Statoil, relatively speaking, has not been a large investor in China to date, Statoil wishes to invest more in China in the future, according to the interviewed informants. Statoil's Beijing office functions as a "listening post" to the company, looking for new investment opportunities, and building relations to both Chinese authorities and Chinese Corporations. For the last two years, the company has been working on a project to extract shale gas¹¹² in China. In general competition has hardened and become more demanding technologically in the oil and gas industry, since in general there are fewer resources easily accessible. This has made shale gas an

¹⁰⁹ Interview 09.02.2011

¹¹⁰ Interview 11.03.2011, interview 10.03.2011

¹¹¹ Interview 11.03.2011

¹¹² Shale gas is a natural gas extracted from shale.

important possible future investment for Statoil, and China is one of the most interesting places on this issue,¹¹³ according to the interviewed informants.

4.1.2. Telecom and hardened competition for costumers

Both the Indian and the Chinese telecom industry have historically been operated as state-owned monopolies. In recent years, though, the Indian telecom sector has been liberalized, and today both domestic and foreign private operators hold the majority of market shares in a highly competitive and fragmented Indian telecom industry. China, on the other hand, has gone from a state-owned monopoly to a state-run oligopoly, with a highly regulated telecom sector dominated by state-owned corporations and with little room for profitability for foreign investors.¹¹⁴ Still, this may change in coming years. Following China's WTO accession in 2001 gradual regulatory reforms have been started in order to open the telecom sector to foreign investors. While still not implemented fully, the WTO deals imply that eventually foreign companies will be able to own up to 50 per cent of joint telecommunication ventures.¹¹⁵

Accordingly, Telenor is active in gaining market access in India, while it has not invested in China. In India, Telenor aims to achieve a market share of 8 percent, meaning 180 million customers, and has so far invested \$ 1 - 2 billion in the country, and keeps on investing, according to a Senior Vice President interviewed for this study.¹¹⁶ Telenor is doing business in India through UniNor, a joint venture with Indian license holder Unitech. While this company is currently involved in serious allegations of corruption, extensively covered in national and international media, the informant in Telenor says that their Indian investments has so far yielded good turn-overs, as the company attracts 3 million new customers each month.¹¹⁷ Still, the informant stressed that competition for market access in India is harsh as many corporations are fighting over the telecoms market, and described a situation where corporations are "swarming" to India, as it is seen as a "place where you make a lot of money."¹¹⁸

¹¹³ Interview 11.03.2011

¹¹⁴ Hanson and Zheng (2010): 337

¹¹⁵ Saich (2004): 326

¹¹⁶ Interview 23.03.2011

¹¹⁷ Ibid.

¹¹⁸ Ibid.

4.1.3 The aluminum industry and a demanding market

In the aluminum processing industry, Norwegian corporations are also investing in China. Still, market shares of these corporations are limited. These corporations have strong aspirations and strategies to expand their market shares in Asia, and especially in China, according to interviewed informants in these corporations.

Manufacturer of extruded aluminum profiles SAPA, wholly owned by Orkla Group, currently runs two factories in Shanghai, China. In addition, the corporation has signed a Memorandum of Understanding with the largest aluminum company in China, Chalco (Aluminum Corporation of China Limited) to build a new factory in a joint venture.¹¹⁹ According to a press release, this was established on April 8 2011 with a 50/50 percent ownership, and this factory will serve the growing high-speed train industry in China.¹²⁰ While SAPA is the largest holder of market shares in their field in both Europe and the US, their market share in Asia in general is small. They wish to increase this market share, and have recently bought the majority of shares in a Vietnamese corporation, and have bought 100 percent of a corporation in Bangalore, India. While stating that China is an extremely important market to be investing in, due to the high economic growth rates, this is also a demanding market for the aluminum industry. According to the respondent, a lot of corporations are setting up capacities there, and the Norwegian corporations holds a higher cost level than many other investors.¹²¹

In addition to Sapa, Orkla is also investing in China through other parts of their group. They own 42 % of paint manufacturer Jotun, which is currently setting up its third factory in China. Another part of Orkla Group, supplier of branded consumer goods Orkla Brands is investing in India, where they hold strong market positions, according to the interviewed respondent in Orkla. So far, Orkla Brands has no strategy to invest in China, since local brands in China are not as strong as other places, making this a market less appealing to Orkla Brands investments, according to the informant.¹²²

Hydro, a global supplier of aluminum, owns and runs a factory in industrial park Suzhou in China. Earlier, when Chinese authorities demanded foreign investors to invest only through joint

¹¹⁹ Interview 14.03.2011

¹²⁰ Orkla (2011)

¹²¹ Interview 14.03.2011

¹²² Interview 14.03.2011

ventures in this industry, Hydro was running the corporation Hydro Aluminum WUXI in co-operation with a Chinese corporation. Both parties were unsatisfied with the co-operation, and eventually the Chinese partner opened a similar factory which was located a one hour drive from WUXI. In the eyes of several interviewed informants in the Norwegian business sector, the Chinese partner drained the factory of both technology and personnel,¹²³ and the partnership ended. Hydro is also co-operating with Chinese corporations abroad. For instance, Hydro has purchased the equipment for its factory in Qatar, the world's largest aluminum factory, from a Chinese corporation, according to the interviewed informant.¹²⁴

Attempts by Hydro to invest in India have not succeeded, due to CSR¹²⁵ issues. Hydro was working to set up bauxite mines in India from 1992 to 2000, but this failed as the bauxite deposits, which is extracted and later turned into alumina and then aluminum, was situated in holy grounds. The owners of these grounds were illiterate, leaving NGOs to protest the purchase or rent of lands from the company.¹²⁶ Consequently, Hydro decided to concentrate on investments in Brazil in stead, according to the informant.

4.2 Assessments of the investment regulatory framework

In general, the NHO has stressed the importance of BITs in emerging market economies as these often have unstable investment regimes, meaning that BITs are important to reduce the risk of investing in such countries.¹²⁷ In the following section it becomes evident that, at large, the corporations view the Chinese regulatory framework as quite stable and foreseeable. It is also found that there are some differences across different sectors, when it comes to perceptions of the investments framework (the picture is different when it comes to trade). In general, the interviewed informants view the investment framework in China as more stabile than in India.

China is actively directing FDI in order to fulfill their goals of the five year plan, especially in order to reduce CO₂-emissions and increase energy efficiency in the industries.¹²⁸ This means that the stability of the framework for the corporations is related to the desirability of the

¹²³ Interview 10.01.2011, Interview 09.02.2011

¹²⁴ Interview 10.03.2011

¹²⁵ Corporate Social Responsibility

¹²⁶ Interview 10.03.2011

¹²⁷ NHO (2011)

¹²⁸ Gallagher and Shan (2009): 1.26, interview 14.03.2011

investments according to the authorities. This has also been the experience of Norwegian corporation Elkem, which was purchased by Chinese corporation China Bluestar this year. According to a former Senior Vice President interviewed for this study, Elkem has experienced that Chinese authorities close down the electricity to the factory, implying a full stop in production, in order to reach political goals of energy-saving.¹²⁹ In addition to giving incentives for energy saving, corporations with low energy-efficiency are permanently closed down by the local authorities.¹³⁰

In general, though, the informant from Orkla/Elkem says that the regulatory framework in China is good and stable to their experience.¹³¹ The informants in Statoil share this perception. They report that China has been occupied with creating a stable framework in order to attract investments.¹³² Partly this is explained, by the Statoil representatives, through the fact that China has developed a framework for the oil sector which is win-win to both parties. Being profitable for both the Chinese state and the international oil companies, the regulatory framework for the sector is more stable. Also, the fact that the oil sector is global, implying that also the Chinese oil corporations are competing for access to resources abroad, means that China has a general incentive to keep a good reputation globally, in the oil sector. Still, new challenges can arise from the still hardened structure of competition in the oil and gas sector. As shale gas is a new phenomenon world-wide, the regulatory framework on this issue has not been very well developed yet according to the interviewed informants. Also, the production of shale gas is expected to be technologically challenging, and the commercialization is complex as well.¹³³

This has led Statoil to expect possible challenges in China regarding the regulatory framework. The challenges are especially on gas pricing, as this is subsidized and it can be hard to get profitability. Still, based on the five year plan of China, the informants in Statoil are optimistic as to reaching good solutions for both the authorities and the corporations on the issue of shale gas. They base their optimism on reports from Chinese authorities that they have a large focus on extracting this gas. In their current energy mix coal makes up 75/80 percent. China has an

¹²⁹ Interview 14.03.2011

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Interview 11.03.2011

¹³³ Interview 11.03.2011

ambition both to increase the available energy resources for the growing middle class, and to reduce CO₂ emissions. Shale gas is seen as an important measure to achieve these goals, the Statoil informants argue. While gas only makes up approximately 3 percent of the total energy mix today, Chinese authorities has an ambition for gas to make up 10 percent of the energy mix in the future, mainly through the extraction of exactly shale gas. The informants state: “Energy self-sufficiency is important to China, to have access to their own resources.”¹³⁴

Contrary to the interviewed informants from Orkla and Statoil, Hydro has more mixed experiences on the stability of the regulatory framework in China. As described above, Hydro has had bad experiences in investing through joint ventures in China. This has led to skepticism regarding possible future investments through joint ventures, according to the informant in Hydro. Still, the informant reports that investments without joint ventures are well functioning regarding regulatory framework.¹³⁵

It is a general perception among the interviewed informants that India is a more challenging location for investments than China. As described above, the telecom sector is very fragmented and competitive in India, and Telenor has experienced that the framework for investments in India is especially unclear and politicized. The ongoing dispute on the awarding of licenses in the telecom sector means that the corporations are worrying about the future of their current licenses.¹³⁶ The informant in Telenor reports that the framework is more unclear than was expected when the Indian investments was made, and that competing telecom corporations have made the authorities hold up processes in order to get competitive advantages.¹³⁷ The informant from Orkla says that the framework for investments in India is more unstable than in China to their experience. This is partly due to the fact that India is a democratic state, meaning that national authorities have less control over local authorities.¹³⁸

4.3 Competitive disadvantages

Both the telecom, oil and gas and aluminum industry have sector intrinsic motives to gain market access in both China and India, The interest group of the business sector argues in general terms

¹³⁴ Ibid.

¹³⁵ Interview 10.03.2011

¹³⁶ Interview 23.03.2011

¹³⁷ Ibid.

¹³⁸ Interview 14.03.2011

that Norway should change its BIT policy in order for Norwegian corporations not too loose grounds in the international competition with other corporations. According to the trade director in NHO, it is a big problem that Norwegian corporations are operating under a worse framework than European competitors, and points to the fact that Germany has more than 150 BITs. Due to the politicization of the BIT-issue following the MAI-agreement, Norway has been sidelined compared to other Nordic and European countries that have been more willing to negotiate BITs, according to the informant in NHO.¹³⁹

4.4 Does BITs matter to the corporations?

Several of the large Norwegian TNCs have sector-intrinsic motives to invest in both China and India. Business interest organizations are worried that the Norwegian TNCs will be at a competitive disadvantage in these countries without a change in Norwegian BIT policy. But empirical evidence from the United States shows that corporations are to a large extent indifferent towards BITs in their investment strategies. As a contribution to the now ongoing academic debate on whether or not BITs “work”, in the sense that they create more investments between the countries that sign a BIT, a survey was sent to the top 200 U.S. corporations on the Fortunes 500 list. The results shows that even the general counsels of the major U.S. TNCs both have little knowledge of BITs, and also do not have much faith in their effect.¹⁴⁰

The U.S. in general has a bigger internal market and less foreign investments than Norway, so to what extent is the result of the survey relevant for Norwegian TNCs? While no systematic large-N study has been conducted to answer this question, the interviewed informants in the business interest organization and the large Norwegian corporations in this study, gives some first empirical indications as to whether or not Norwegian corporations “know and care” about BITs.

The business interest organization, NHO, claim that they do care. Also when confronted with the results of the US survey mentioned above. “In general BITs are important to the Norwegian business sector”, according to a press release from NHO dated February 2011.¹⁴¹ The primary reason for this, according to the press release, is that the corporations need reduced risks when investing in emerging economies. NHO states in the press release that the most important

¹³⁹ Ibid.

¹⁴⁰ Yackee (2010)

¹⁴¹ NHO (2011)

countries to negotiate such agreements with, through a separate BIT or as part of a bilateral FTA, is the BRIC-countries.¹⁴²

This study finds that the perception of NHO that Norwegian corporations care about BIT is shared in the Norwegian Ministry of Trade and Industry. While the interviewed informant has noted that research gives very uneven results as to whether or not the BITs are important to the corporations, and stressed that BITs in not the primary concern in the investment decisions, it is a general experience that the corporations are to a still larger degree asking for investment protection. This is especially true in states with political turmoil or corruption, according to the informant. The increasing demand for BITs should be seen in connection with a current rise in disputes being resolved at international arbitration tribunals (see section 5.4). Both NHO and the Ministry of Trade and Industry assess that the fact that the corporations are experiencing that the agreements come to work also in cases where a dispute does not actually end in arbitration leaves the corporations to request these agreements. In line with this argument, the NHO argues, both in the above-mentioned press release and in the interview conducted in this study, that BITs also have disciplinary effects on the host country.¹⁴³

When being interviewed for this study, the director of trade politics in the NHO stated that “BITs is important for large companies like Statoil, Hydro and Telenor”¹⁴⁴ when he was asked which Norwegian corporations are most engaged in the issue of BITs. The trade director added that small and medium sized enterprises that are not in a position to negotiate deals with foreign countries are also concerned with BITs. Looking at the list¹⁴⁵ of actors who have answered the public hearing on a Norwegian model BIT in 2008, it is these three corporations exactly (Statoil, Hydro and Telenor) who are the only Norwegian corporations that have send in hearing letters.

¹⁴² In addition to the BRIC-countries NHO also mentions the following countries as BIT-negotiation priorities: Thailand, Malaysia, Vietnam, Korea, Tyrkey, South Africa, Uganda, Kenya, Tanzania, Angola and Qatar.

¹⁴³ NHO (2011)

¹⁴⁴ Interview 09.02.2011

¹⁴⁵ For the list of organizations who have answered the public hearing, see: NHD (2008).

These hearing letters are stressing the importance of BITs in general, as well as the need for the model agreement to give better protection to Norwegian corporations investing abroad.¹⁴⁶

Based on the interviews with key informants in the corporations who are the most occupied with BITs according to the NHO, this study finds that the concern with BITs even in these corporations is modest. This is especially true for Statoil, since the corporation is already negotiating the same degree of investment protection in to their separate contracts with the host-countries of their investments. These include external investor-state arbitration, in the case of China through the World Bank arbitration tribunal, ICSID.¹⁴⁷ This practice is not dependent on whether or not Norway has a BIT with the host-country, according to informants in Statoil. While Statoil in their hearing letter has stated that BITs is important to them, this could possibly be a result of a perception that BITs are more than simply a legal contract to ensure actual investments, but also a tool to “discipline” emerging economies in their regulatory policies towards inward FDI (as described above). Although NHO stresses in their press release that BITs are not an efficient tool to influence framework conditions in the host country of the investments, but only functions as a safety net in the event of large problems for the investor, they state in the same press release that “a BIT has disciplinary effects on the host country.”¹⁴⁸ It is also stated that investor-state arbitration can function as a “snake in the grass”¹⁴⁹ in the relation with the host state.¹⁵⁰ In line with the argument in the press release, both the informants in NHO and the Ministry of Trade and Industry have stressed in the conducted interviews that the fact that a BIT has not been used does not mean that it does not work.¹⁵¹

For both Hydro and Orkla as well, the interviewed informants express the BITs are not very important to them. The informant in Hydro said that:

“We are not very concerned with this, as a global institution. The bureaucracy lives its own life sometimes. I don’t think there has been any pressure from Hydro on this. The large corporations don’t need this. And the smaller corporations have not

¹⁴⁶ These hearing letters can be found at NHD (2008)

¹⁴⁷ Interview 11.03.2011

¹⁴⁸ NHO (2011)

¹⁴⁹ My translation. In the hearing letter the Norwegian term “ris bak speilet” is used (NHO 2011).

¹⁵⁰ Ibid.

¹⁵¹ Interview 01.03.2011, Interview 09.02.2011

initiated this either, I think. You have to place your eggs in different baskets, instead of relying on a BIT.”¹⁵²

In the case of Orkla, the fact that these agreements are bilateral means that they are not given as much weight as if they were more robust multilateral agreements. The Senior Vice President in Orkla states in the interview for this study that:

“We have said, and meant, that this is important to get fixed. But that being said, we generally think that the downside of ending up in a dispute is very big, with or without the BIT. When making an investment decision we primarily look at how the tax system is functioning, the relationship between local and central authorities, and the local situation surrounding the corporation. Only in case of great risks, we look into the safety net surrounding the investment. Bilateral or multilateral structures may be helpful in case of problems, but only if these structures are strong and clear. In the case of a multilateral structure you get a much stronger discipline in case countries break the agreements, than in bilateral agreements.”¹⁵³

The exception to the general finding that the large Norwegian corporations are not very concerned with BITs is Telenor. While the other corporations interviewed have not been involved in disputes where a BIT would be relevant, Telenor has a different story. A famous dispute between Telenor and Russian conglomerate Alfa on the mobile phone company VimpelCom played out from 2004 - 2009. During this dispute, Telenor was contemplating if they should make use of the BIT between Russia and Norway from 1995, according to the interviewed informant in Telenor Senior Vice President Harriet Berg. The BIT was not used, since "filing a law-suit in an arbitration tribunal is a last resort. It would for instance imply a worsening of the relationship to the authorities."¹⁵⁴ Telenor is still investing in Russia.

In addition to the dispute in Russia, Telenor is currently involved in a before-mentioned dispute in India. Telenor's Indian partner Unitech, with whom they own the mobile company UniNor, is charged with corruption over the allocation of licenses, and a former Indian telecom minister, at the federal level, is currently in prison for corruption. In several media articles it has been stated that Telenor may lose its license due to these corruption charges.¹⁵⁵ This case, in general, seems to have made the question of investment protection more relevant to Telenor. In an interview for this study the Telenor Vice President states that:

¹⁵² Interview 10.03.2010

¹⁵³ Interview 14.03.2011

¹⁵⁴ Interview 23.03.2011

¹⁵⁵ See for instance: Dagens Næringsliv (2011)

“Telenor and Statoil have in common that we need licenses from the authorities in order to do business. This means that the authorities have a lot of power over us. If a license is withdrawn, something we have yet to experience, a BIT is relevant.”¹⁵⁶

4.4.1 Does state ownership matter?

In a statistical study of the role of state ownership in the FDI-decisions of Norwegian corporations, it is found that state owned enterprises (SOEs) are more likely to invest in countries with high levels of corruption and weak rule of law than privately owned enterprises.¹⁵⁷ It is argued that SOEs are more willing to take risks due to a perception that the home country will assist them in the case of investment disputes.

Based on the interviews with key informants in large Norwegian SOEs in this study, it is found that large Norwegian SOEs are not very concerned with bilateral agreements protecting investments abroad. With the exception of Telenor, they explicitly state that they should rely on their own risk assessments and the negotiation of legal contracts with the host country in stead of bilateral investment agreements. This implies that their confidence in the state should not make them more prone to invest in countries with corruption and unstable regulatory frameworks. On the other hand, SOE Telenor has a history of investment disputes (and its partner in India is currently charged with corruption) in their foreign investments, and seem more prone to take risks in their choice of host country for foreign investments. This study argues that this is primarily due to the structure of competition in the telecoms industry, which could also explain why they are more risk willing than other SOEs interviewed.

Telenor also differ from the other studied corporations in the way that they are concerned with BITs. Although the findings in this study could imply that SOEs are actually not risk willing as a consequence of state ownership, it could also be argued that they are less worried with legal regulations and agreements exactly because they are confident that the state will step up to assist them in the case of an actual dispute, without the need for arbitration.

4.4.2 Small and medium sized enterprises

Small and medium sized enterprises have not been interviewed for this study, on their perceptions on BITs. This means that it is not excluded that other corporations than those

¹⁵⁶ Interview 23.03.2011

¹⁵⁷ Knutsen, Rygh and Hveem (2011)

interviewed for this study could have initiated this policy change through NHO. Still, some first empirical evidence implies that BITs are most important to large corporations. As mentioned above, only the large corporations answered the public hearing on a model BIT, even though the hearing letter specifically stated that the Ministry was interested to hear from the corporations on which countries should be prioritized as future negotiating partners. Scholars of bilateral investment agreements have stated that investment agreements are only relevant to large investors, since it demands a lot of resources to bring a country in for arbitration.¹⁵⁸ A review of all cases filed in ICSID has shown that 20 percent of all corporations filing a case in ICSID rank within the top 500 globally.¹⁵⁹ Still, a reservation is made in the claim that the Norwegian corporations are generally not occupied with BITs, due to the fact that no smaller or medium sized corporations have been interviewed for this study.

4.4.3 TNC support is not generic

In the hearing letters answering the public hearing on a proposal for a Norwegian model BIT, the corporations and the NHO all stressed that external investor-state arbitration is the most important feature of BITs.¹⁶⁰ In addition, the corporations stressed that the proposed period of three years of trying the case in a national court before arbitration at ICSID could take place was far too long, and that so-called Umbrella clauses should be included. These are provisions that make the BIT applicable also for separate contracts between an investor and the state, in addition to the actual signed agreement between the two states.

While the interviewed informants are all stressing the importance of the fact that the government has now made an opening for a policy change, the support of the TNCs is not generic. It depends on the actual content of the agreement, especially on the question of external investor-state arbitration. The informant in Telenor expressed this most clearly, stating that the important question is how good the actual text is, and that if the text is only saying “merry Christmas and happy new year” there is no reason to include it.¹⁶¹

¹⁵⁸ Ministry of the Environment (2011) [seminar]

¹⁵⁹ Bretton Woods Project (2009)

¹⁶⁰ The hearing letters from Telenor, Hydro, Statoil and NHO can be found at NHD (2008). Interview 01.03.2011.

¹⁶¹ Interview 23.03.2011

4.5. How are interests channeled?

Bureaucratic capture is especially relevant for ministries of trade and industry (a phenomenon described in section 2.3.2). This implies that the ministry grows close ties to the business interests they are supposed to regulate, and ends up serving them instead. The Norwegian Ministry of Trade and Industry will not give information of procedures and processes leading up to the ongoing FTA negotiations with China (see section 3.3.1), but have been willing to share information regarding the processes leading up to the model BIT public hearing in 2008. In general, and opposing the findings in the grounded theory of the two-level model that business interests will be active in pushing the agenda in trade issues, this study finds that it is often the ministry who initiates the contact with the large corporations. This is based on the interviews with informants in these corporations, who all express that the Ministry visits the corporations on a regular basis to inform them about the ongoing trade and investment negotiations, and with questions of priorities and challenges important to them.¹⁶² The informants also have a common belief that the ministry follows up on this information in the negotiations.¹⁶³ For instance, the informants in Statoil do not see that they have initiated the issue of an FTA with China: “We have said that we are positive towards the FTA, but I guess the initiative did not come from us.”¹⁶⁴

While the corporations are not initiating the contact with the ministry, the NHO is active towards the authorities. This is not surprising, given its nature as an advocacy organization for the Norwegian business sector. A NHO panel on trade politics, consisting of corporations and interest organizations concerned with international framework conditions, has regular consultations with the Ministry on trade negotiations in general. This panel has initiated a seminar series on BITs, with State Secretaries in the Norwegian Ministry of Trade and Industry, the Ministry of Foreign Affairs and the Ministry of Justice.¹⁶⁵ This panel is led by a representative from Telenor. According to the interviewed informant in NHO the panel has especially been preoccupied with China and India.¹⁶⁶ This panel is keeping itself up to date on the negotiations.

¹⁶² Interview 23.03.2011, Interview 10.03.2011, Interview 14.03.2011, Interview 11.03.2011.

¹⁶³ Ibid.

¹⁶⁴ Interview 11.03.2011

¹⁶⁵ Interview 09.02.2011

¹⁶⁶ Interview 09.02.2011

It is not only the NHO that initiates these channels of influence on the Norwegian policy in the trade and investment agreements. According to the interviewed informant in NHO, the Ministry of Trade and Industry has recently summoned what they have called a “Reference Group” to the FTA negotiations, consisting of business sector organizations. This is separate from the formalized consultations together with other constituents, namely LO and NGOs. The informant in NHO says that:

“This is because the Ministry wants to hear from the actors in this. You don’t make trade agreements for the NGOs, but for business. We have good dialogue with the Ministry, it is open and confidential.”¹⁶⁷

4.6 Chapter summary

In this chapter it is discovered that the large Norwegian corporations differ in their perspectives on China as a host country for FDI. These different perceptions are related to industry sector, and they influence the corporations’ interests towards BITs. Still, it is a general perception among the interviewed informants that the Chinese regulatory is quite stable compared to other emerging economies, like India. It is also found that the Norwegian business interest organization, NHO, is active in pushing the BIT policy change, along with Telenor who has an interest in BITs with India due to the structure of competition in the telecom industry. Arguably, there is a case of bureaucratic capture between the Norwegian Ministry of Trade and Industry and the Norwegian business sector. This implies that the ministry attends primarily to the offensive Norwegian interests in the negotiations with China. Finally, it is found that the business interest organization, NHO, is exaggerating the importance of BITs to the large Norwegian corporations, especially to Statoil, Orkla and Hydro.

Overall, in the case of the negotiations of investment provisions in the FTA with China, the interests of the large Norwegian corporations can not fully explain the change of Norwegian BIT policy. While they have welcomed the initiative, they have not been the primary initiators.

¹⁶⁷ Ibid.

Chapter 5: Defensive interests in Norway

This chapter discusses if and how the defensive interests who have previously blocked a change of Norwegian BIT policy, have changed their actions at the domestic game board. It also discusses which actors could eventually be expected to block this policy change from resulting in an actual policy output, in a future ratification of the Norway-China FTA.

5.1 Government composition and the role of trade unions

The political ideology of the government can be expected to play a role for which actors are active at the domestic game board, according to the theoretical framework (described in section 2.3.1). In Norway, with a strong model of corporatism, trade unions should be expected, in general, to be active in the bargains of the regulation of the economy. According to the general theory, workers and their interest organizations are expected to hold opposing interests from capital owners inside of industries when it comes to regulating inward FDI. The opposite is true for trade issues, where capital owners and workers usually share positions inside industries (see section 2.2.1). Hence, since the ongoing negotiations with China are a multi-issue negotiation, the trade unions should be expected to differ in their views on the different provision in the agreement.

In the hearing on the model BIT in 2008, the confederation of trade unions, LO, delivered a short answer that the consequences of entering into such agreements should be subject to a thorough impact assessment, on environment, development and the Norwegian business sector, before a standpoint is taken on the issue.¹⁶⁸ While this model BIT was shelved without carrying out an impact assessment, the fact that this model BIT is now serving as a basis for the FTA negotiations with China has not been challenged by LO. It seems they were not aware of this, probably since they are not as active in following the negotiations due to their confidence in the government in power. An interviewed informant in LO stated that:

“We have not spent much time on the technical issues on investments. With the support LO gives to the government in power, we don’t see that there should be large differences between the goals of the government, and those LO would have. This would probably be somewhat different if the political climate was different, in the case of political disagreements between the government and LO. Then we would probably have a more aggressive attitude and a more aggressive process on this issue. This may be part of the reason why we have not been so heavily involved on this,

¹⁶⁸ LO (2008)

since there is probably not big deviation between what the negotiators have been assigned from the government, and the positions of LO.”¹⁶⁹

Previously, the policy change has been blocked from defensive actors in various ways. “This is an area where it is hard to separate law and politics,”¹⁷⁰ states the interviewed senior advisor on investment agreements in the Ministry of Trade and Industry. While Norway has abstained from negotiating BITs since the mid-1990s and until the policy change that manifested itself in the government declaration of 2009, governments of different ideology and political persuasions have been in power in Norway. According to the trade director in NHO interviewed for this study, even conservative governments who have been attempting to change this policy has been unable to do so. This has primarily been due to bureaucratic agencies that have blocked this change, especially the juridical department in the Ministry of Foreign Affairs, and central bureaucrats in the Ministry of Justice. The trade director of NHO describes a process where politicians who did want to change the Norwegian BIT policy was stopped by juridical bureaucrats, who were claiming that such a change was impossible due to the Norwegian constitution. They claimed that questions of sovereignty related to external investor-state arbitration and the transfer of legal power to a court outside the national legal system, made this policy change impossible. This then, is a case of institutional power, where defensive interests have managed to keep the issue of investment agreements off the agenda in international negotiations. In an attempt to push a policy change NHO actually hired private lawyers to work out a proposal on how the problem could be solved. This proposal was delivered to all ministries around year 2000.¹⁷¹ The Ministry of Justice made a report on the question of BITs and the constitution, which was finished in year 2002 and which led the question of BIT and the constitution to be resolved.

Another factor influencing which actors are active at the domestic game board, is the fact that the governing coalition, which has been in power since 2005, includes the political parties that have previously opposed the MAI-agreement and the inclusion of these provisions in bilateral agreements. While the Labor Party accepts these agreements, there is opposition in the Socialist Left Party (SV) and the Centre Party (SP). This means that the political parties that have been active in opposing bilateral investment agreements are currently part of the government coalition.

¹⁶⁹ Interview 22.03.2011

¹⁷⁰ Interview 01.03.2011

¹⁷¹ Interview 09.02.2011

This is sustained by the trade director in NHO, who have worked on this issue for years, and states: “The problem is not the Labour Party. It lies in the Socialist Left Party and the Center Party, and the NGOs linked to these parties.”¹⁷²

5.2 Controversy and secrecy

With the strengthening of the rights of foreign investors, granting those rights to try national laws and regulations at an external legal system, agreements on investment protection have proven to be politically controversial. During the 1990s it was attempted to negotiate a multilateral investment protection agreement in the WTO. When this failed, largely because of discontent from the developing countries, the OECD tried to develop a common investment agreement, the MAI agreement. This was criticized for limiting the policy space of states to pursue a socially and ecologically sustainable development policy, and the MAI-agreement was shelved in 1998.

As a consequence of the political controversy surrounding the MAI negotiations, Norway has abstained from negotiating investment protection agreements since the mid-1990s.¹⁷³ The proposal for a model BIT sent in public hearing in 2008 also proved to be politically controversial. An attempt to make this issue less controversial implied that the model attempted to find a new balance between the rights of the investor and the states’ right to regulate. This meant that both the NGOs and the TNCs were dissatisfied with the agreement, and that no one would “fight” for the agreement, according to interviewed informants. Informants in the business sector have stated in interviews for this study that if the TNCs had been more satisfied with the result, they believe that the Government would have gone through with it, in spite of the protests from the NGOs.

In Norway the controversy surrounding the question of investment agreement was also very much present in the bureaucratic group preparing the proposal for the model BIT that was put in public hearing in 2008. The interviewed informant in the Ministry of Trade and Industry said that:

“The bureaucratic group differed on a number of issues. The various elements in an investment treaty concerns both offensive and defensive interests, and the ministries represented in the group safeguards various concerns. Finding the "right" balance of these interests is a major challenge and one of the reasons why this has not been

¹⁷² Interview 09.02.2011

¹⁷³ With one exception, the EFTA-Singapore FTA from 2002 includes investment protection provisions, including external investor/state arbitration.

solved in all those years. The provisions on arbitration and expropriation have been considered as the most problematic issues, but the discussions involve a more fundamental issue, namely if, and to what extent, national policy space should be restrained in order to give rights to foreign investors?”¹⁷⁴

The group that prepared the model BIT was deliberately put together of representatives from ministries with different interests in the question of investment agreements, according to interviewed informants. These different interests have been described by an informant as a scale of opinions, with the Ministry of Trade and Industry on the one outer side, and the Ministry of the Environment on the other. This conflict of interests between the ministries can also be observed in the fact that the Ministry of the Environment has set out an environmental impact assessment of the China-Norway FTA, without the participation of the Ministry of Trade and Industry. In a seminar on this impact assessment, it was implied that this impact assessment is carried out to the resentment of the Ministry of Trade and Industry.¹⁷⁵ This impact assessment is focusing on the consequences of both trade and investment provisions for the environment, emphasizing the supposed consequences to the environment of limited rights to regulate as a consequence of the investment provisions. The researchers who are carrying out this environment impact assessment have not been granted access to any of the Norwegian positions in the negotiations.¹⁷⁶

Proposals on Norwegian positions on investment agreement in the ongoing FTA negotiations are developed by the Norwegian Ministry of Trade and Industry. The model agreement serves as a basis when the ministry works out their proposal, according to the interviewed informant in this ministry. The government treated this proposal in October 2010, and decided on the Norwegian positions in the negotiations with China. As described earlier the Norwegian positions are not made public. Still, there are clear indications that the Norwegian Government's positions towards China are including external investor-state arbitration.¹⁷⁷ This means that the same actors that

¹⁷⁴ Interview 01.03.2011

¹⁷⁵ Ministry of the Environment (2011) [seminar]

¹⁷⁶ Ministry of the Environment (2011) [Seminar]. The environmental impact assessment has its own webpage: <http://www.fni.no/Norway-China-FTA>

¹⁷⁷ Personal communications, fall 2010 and winter 2011. In the negotiations with India, on the other hand, the proposal from EFTA only includes state-state arbitration. This is possibly due to the fact that Switzerland has a BIT with India that grants investors more rights in the case of investor-state arbitration than the Norwegian model BIT. This, in turn, means that EFTA could not agree on common positions on external investor-state arbitration in the negotiations with India, as these would limit the rights of Swiss investors. Instead, the common EFTA positions landed on a common lowest standard.

opposed the model BIT could be expected to be activated at the time of ratification. Since the controversial provisions are being negotiated by China in their BITs and FTAs, it is not plausible that they would reject these provisions in the negotiations with Norway.

It is a new but general trend that BITs are increasingly being included in bilateral FTAs, in separate investment chapters or as part of the chapter regulating trade in services, instead of being negotiated as separate treaties. This is the case for FTAs negotiated by the US, Japan, EFTA and Singapore.¹⁷⁸ In a thorough comparative study of American, European and Asian approaches to bilateral FTAs, Kenneth Heydon and Stephen Woolcock argue that it is too early to say if this trend will continue. On one hand, as long as this is excluded from the multilateral agreements this trend is bound to continue. On the other hand, the public opinion in both developed and developing economies may come to question this current trend, for the same reasons they have been opposing the inclusion of comprehensive investment provisions in the multilateral agreements. While the two authors state that “the jury is out” on whether or not this trend will continue in the long run,¹⁷⁹ they assess that for the moment the support that bilateral FTAs can give to both the promotion and the protection of investments “is likely to be the decisive factor.”¹⁸⁰

5.3 Chinese investments and threats to national security

Which defensive interests in the government or in the trade unions could possibly emerge in the event of future Chinese investments in Norway? In January 2011, Chinese corporation China Bluestar purchased the Norwegian metals and energy corporation Elkem. Among the informants in the Norwegian business sector, as well as in the trade union, there is broad consensus that this purchase is only the beginning of more purchases of Norwegian corporations by Chinese firms. The interviewed informants are primarily expecting these take-overs in such industries as fertilizer, oil and aluminum.¹⁸¹

Which potential Chinese purchases could be seen as a threat to national security in Norway? Theodore Moran divides possible threats into three categories, in a contribution on how the Committee on Foreign Investment in the United States (CFIUS) should analyze possible threats

¹⁷⁸ Heydon and Woolcock (2009): 236-248

¹⁷⁹ Heydon and Woolcock (2009): 121

¹⁸⁰ Heydon and Woolcock (2009): 237

¹⁸¹ Interview 10.03.2011, Interview 14.03.2011, Interview 09.02.2011, Interview 22.02.2011

to national security.¹⁸² First, a purchase that makes the state dependent on a foreign-controlled supplier of a crucial good or service, who might delay, deny or place conditions on the provisions of those goods and services as a form of sanction. Second, an acquisition that would transfer technology and/or expertise to a foreign owned entity or the government, who might use this technology to harm the interest of the state. Third, a purchase that may allow insertion of means for infiltration, surveillance or sabotage in goods or services crucial to the functioning of the economy. These threats are all particularly relevant to the defense industry, but not exclusive to this industry. All of these should be analyzed according to the bilateral relationship between the states involved, and the actual likelihood of a conflict that could give incentives for sanctions.

Which of these perceived threats to US security could be applicable in a Norwegian context? Telenor has recently signed a large contract with Chinese mobile phone company Huawei, in a large project to renew the mobile network and replace all mobile transmitters in Norway. In addition, Norwegian telecom corporation Netcom holds a contract with Huawei. These contracts have not been subject to much debate in Norway. In the US, on the other hand, the corporation has been subject to analysis of CFIUS two times. Both times CFIUS has argued that Huawei's investments in the US telecom industry could give the Chinese military means to surveillance and infiltration in the US military and government.¹⁸³ CFIUS has reported that Huawei is closely linked to the Chinese People's Liberation Army, working on techniques of cyber warfare. In the 2008 US Department of Defence "Annual report to Congress on the military power of the People's republic of China", Huawei is identified as one of three corporations who are working closely with the PLA on techniques of cyber warfare. In March 2008 Huawei and their US partner announced that they were withdrawing their proposal to acquire US telecom corporation 3com. A new attempt for Huawei to enter the US telecom sector was recently denied by CFIUS, and Huawei withdrew the offer just before the US president was supposed to decide on whether CFIUS were right in denying the purchase.¹⁸⁴

As a self-declared multilateralist state with a small open economy, the economic concerns regarding the take over of industries, for instance through transfer of off-shore technology, should be expected to be more important in a Norwegian context than those of security politics. Also, perceived threats to workers rights and the environment could be expected to be more

¹⁸² Moran (2009)

¹⁸³ Moran (2009): 25 - 28

¹⁸⁴ Aftenposten (2011c)

important among Norwegian defensive actors. A general concern falls within antitrust theory, the concern that another nation might use foreign acquisitions as part of a broader strategy, including trade protection and government subsidy, to gain domination in individual industries. This type of accusation was often made against Japan in the 1980s.¹⁸⁵ Such a concern has been raised by an informant in the Norwegian metals industry interviewed in this study. In taking over market shares, the interviewed informant in Hydro is expecting that the Chinese has a strategic plan to follow a well known approach to start with trade, then taking over shares through foreign investments when they do not gain more from trade. The purchase of Elkem is an example of this, according to the informant, who states that Orkla (the former owner of Elkem) is sitting on markets the Chinese want:

“The strategy is to buy their way into bauxite¹⁸⁶ mining and take the raw material home to create work places and export high value products, such as cars, solar panels and shower cabinets. As part of this strategy China uses tax provisions and export fees, instruments that are not regulated by the WTO, to hinder the export of aluminum. China will rather export cars than aluminum. This is a slick way to take over the market.”¹⁸⁷

5.4 Arbitration

In the following it is argued that recent developments in international investment arbitration imply that developing countries, including Norway, could possibly be facing law suits as a consequence of the change in BIT policy. This development may lead some defensive interests to oppose the investment provision in the ratification of the China-Norway FTA.

Informants in the Norwegian business sector have stated that the concerns of Norway facing arbitration, challenging the right to regulate, are unfounded. Their primary argument is that the regulatory framework is so well-developed in Norway and other EU states, that this is not a plausible concern. While the disputes in the World Bank investment arbitration tribunal, ICSID, have traditionally been between developing countries and corporations from developed countries, recent developments show that this trend is changing.

In general, in recent years, there has been a rapid growth in the number of investment disputes tried at ICSID, following the general rise in signed BITs. In total, since the creation of ICSID in 1966, 331 cases have been registered at the tribunal according to the bi-annual statistics of the

¹⁸⁵ Moran (2009): 35

¹⁸⁶ Bauxite is an aluminum ore, rocks extracted and later processed into aluminum.

¹⁸⁷ Interview 10.03.2011

ICSID secretariat.¹⁸⁸ Until the late 1990es the yearly number of cases registered was between zero and four. From 2003 approximately 30 cases has been registered each year.¹⁸⁹ 25 percent of all cases tried at ICSID so far have been in the oil, gas and mining industries.¹⁹⁰ As mentioned above, informants in the Norwegian business sector see these industries to be particularly interesting for Chinese investors.

So far, China has not been sued in any disputes at the ICSID tribunal, but this is expected to change, given the dramatic rise of FDI into China, and the following increase in investor-state disputes in the country. It should be expected that the world will see a rising number of cases involving central or local authorities in China, as well as Chinese corporations, at the tribunal. This is as a consequence of the “Go abroad” (*Zou Chu Qu*) strategy of Chinese corporations and the general and explosive increase in the number of disputes that are tried at ICSID. The first ICSID case involving a Chinese corporation was filed in 2007, in the case of a Chinese fish flour producing corporation versus Peru.

The countries getting sued through ICSID so far has primarily been developing countries so far,¹⁹¹ but in recent years developed countries have been brought in for the tribunal as well. When interviewed for this study, the trade director in NHO argued that Norwegian concerns that BITs would limit Norwegian right to regulate were unfounded, since the EU member states have negotiated numerous BITs while also implementing numerous new EU regulations, without these regulations being challenged.¹⁹² A recent case shows that EU regulations can also be challenged as a consequence of negotiating BITs. In 2009 the Swedish corporation Vattenfall sued Germany for introducing environmental regulations that limited the use and discharge of cooling water at a coal plant that the company was building at the banks of German river Elbe. Vattenfall was claiming compensation for lost revenues, while German authorities responded that the regulations where a result of an EU directive on water quality, which had implications for all

¹⁸⁸ ICSID (2011): Chart 1, page 7

¹⁸⁹ Ibid.

¹⁹⁰ ICSID (2011): Chart 7, page 12

¹⁹¹ In total, only six percent of the cases tried are against countries in Western Europe and North America. In comparison, 17 percent of the cases tried have been against countries in Sub-Saharan Africa, 30 percent against South America, and 22 percent against countries in Eastern Europe and Central Asia (ICSID (2011))

¹⁹² Interview 09.02.2011

industries alongside German rivers. The parties reached a settlement in august 2010.¹⁹³

Hence, when OECD countries are now signing a large number of trade and investment agreements with large developing countries with emerging economies and high growth rates, like China, it should be expected that these agreements will be more mutual than earlier agreements. These were primarily about the protection of western corporation's investments in developing countries.

5.5 Chapter summary

Investment agreements are surrounded by political controversy in Norway. This controversy, following the MAI agreement, has been the reason that Norway has had a policy of not entering into such negotiations for the last 15 years. One reason why this policy has changed seems to be the party-political composition of the government in power. This has kept some of the major players, who have formerly been opposing such policy change, from the domestic game table. The trade union is not following this issue, as they trust the government is attending to their interests. The political parties that have previously been advocating against investment agreements are now part of the government coalition. Also, the general secrecy in Norwegian bilateral trade policy means that the content of Norwegian positions is not up for public debate. This means that the defensive interests may come to block the policy change at time of ratification, when the content of the negotiated agreement with China is made public. A possible change in government may also activate defensive interests, i.e. the political parties that are now keeping silent due to the discipline in the government coalition. Future Chinese purchases of Norwegian industry, as well as the development in arbitration trends in ICSID, may possibly increase the activity of defensive players at the domestic game board.

¹⁹³ The details of the lawsuit and the amount that was agreed upon in the settlement is not known, since the parties decided that the case be tried without public access. The original claim was for approximately 1.4 billion Euros, and the total investment of Vattenfall in the project was 2.6 billion Euros.

Chapter 6: The case of China

A recent trend is that companies from the emerging economies invest abroad. In 2008 almost 9 per cent of global investment outflows were investments from corporations in the BRIC-countries (Brazil, Russia, India and China). In comparison, the BRIC countries held less than 1 percent of world total FDI outflows just ten years ago.¹⁹⁴ Also, the TNCs of the BRIC-countries are to a growing extent investing outside of their own regions. For instance, in the mid-1990s, 75 percent of India's FDI outflow was concentrated in Asia, while by 2008 61 per cent of the FDI outflow went to host countries outside Asia.¹⁹⁵ China is the emerging economy with the most active corporations in foreign investments. China is also the most active country on negotiating BITs in the world, second only to Germany. This chapter discusses whether the change of Norwegian BIT policy could be imposed from the emerging economies, the negotiating partners in the FTAs, mainly focusing on China. To come closer to an answer to this question, the development in Chinese foreign investments is discussed, both in general and more specifically towards Norway. The development in Chinese BIT and FTA policy in recent years is also examined, with a special focus on policies towards New Zealand and Australia. Finally, the power relationship between the negotiating partners is discussed.

6.1 Who asked?

The first indication of a possible change in Norwegian BIT policy became apparent in 2008, with the Norwegian government proposal for a model BIT. While this was later shelved it can still shed some light on the reason for the initiative to change Norwegian BIT policy. The hearing letter stated as one of the reasons for the proposal that “several developing countries has asked Norway for a BIT.”¹⁹⁶ In an attachment to the hearing, a report describes the background for the initiative in more detail, stating that there are two main reasons for the proposed change in Norwegian BIT policy: “Out of consideration for Norwegian corporations possibilities to compete abroad on similar conditions as other countries' corporations, and because of enquiries

¹⁹⁴ UNCTAD (2010): 7

¹⁹⁵ Ibid.

¹⁹⁶ The hearing letter, dated 08.01.2008, can be found at NHD (2008). (My translation)

from countries who wish to enter into investment agreements with Norway and the other EFTA-states, it is desirable with a clarification of Norwegian positions.”¹⁹⁷

In this study it has been attempted to get an answer as to which countries, or at least how many, have asked Norway for bilateral investment agreements. The Norwegian Ministry of Trade and Industry, who sent out the public hearing and led the work with the model agreement, have not been able to answer this question. They have replied that the enquiries are often made to the Ministry of Foreign Affairs, and that the Ministry of Trade and Industry are not aware of any common account of which countries have asked for BITs in recent years.¹⁹⁸ Still, in a leaked internal memo between the parties in government from 2007, concerning the preparation for the public hearing of the model BIT, secretary of state in the Norwegian Ministry of Trade and Industry, Rikke Lind, states that the model agreement and the problem of clarification of Norwegian positions on investment protection is made highly salient by the ongoing FTA negotiations between India and EFTA.¹⁹⁹ It is also stated in the memo that India has asked Norway for a BIT several times. The Ministry of Trade and Industry have refused to answer a question posed in this study of whether China has asked Norway to include investment protection provisions in the FTA, since that would reveal Chinese positions in the ongoing negotiations.²⁰⁰ A closer look at Chinese BIT and FTA policy could possibly give some indications as to whether or not China has initiated the Norwegian policy change.

6.2 Chinese FTA policies

While the Chinese communist party is still ruling the country through economic five year plans, the Chinese economy has gone through a gradual transition towards an open market economy since the end of the 1970s. In December 2001 China became a member of the WTO. In addition to liberalizing trade and investment rules through the WTO membership, China has also negotiated numerous bilateral FTAs in recent years. Most of these agreements have been signed with other Asian countries. In April 2008 China signed a bilateral FTA with New Zealand. This

¹⁹⁷ Attachment to the public hearing, "Kommentarer til modell for fremtidige investeringsavtaler", dated 19.12.2007. This can be found at NHD (2008).

¹⁹⁸ E-mail correspondance 14.04.2011 and 26.04.2011. Requests have been sent to the Ministry of Foreign Affairs, asking if they keep any such common account, or if they know of any concrete examples of which countries has asked for BITs, but these requests have not been answered.

¹⁹⁹ Internal memo in the government and between the parties of the government coalition in parliament, in relation to the governments preparation of the hearing letter on BITs, november 2007.

²⁰⁰ Interview 01.03.2011 and E-mail correspondance 14.04.2011 and 26.04.2011

agreement is particularly relevant to the ongoing negotiations between Norway and China, as this agreement is both comprehensive, includes many of the same areas as the negotiations between Norway and China, and because this is the first agreement China has signed with a developed country (an OECD member state).

In addition to the signed agreements, China is currently negotiating FTAs with Australia, the South African Customs Union (SACU), consisting of Botswana, Lesotho, Namibia, South-Africa and Swaziland, and the Gulf Cooperation Council, consisting of Bahrain, The Arab Emirates, Kuwait, Oman, Qatar and Saudi-Arabia. Negotiations with Iceland were launched in March 2007, but were shelved as a consequence of the Icelandic economic crisis. At the moment, China is undertaking joint feasibility studies of future FTAs with India, South Korea, Japan and Switzerland.

6.2.1 How does China choose its FTA partners?

Could Norway be an important FTA partner to China, also with regards to the investment chapter of such an FTA? A study of the general rise in bilateralism in FTA, comparing Asian, European and American approaches to FTAs, finds that the US, the European Union, Japan and Singapore hold different mixes of economic, political and strategic motives in choosing their FTA partners. While EFTA is most concerned with economies motives, Japan is generally the least motivated by economic concerns of the studied actors. Japan is to a much larger extent motivated by wider political concerns, especially in curbing Chinese power in their region.²⁰¹

A study of Chinese FTA policy contributes to expand the story of the Asian approaches to bilateral FTAs, and which motives guide the choices of negotiating partners. Dr. Jian Yang of University of Auckland has analyzed the foreign policy advice of influential Chinese think tanks, which, according to Yang, play a crucial role in forming a still more professionalized and pluralist Chinese foreign policy.²⁰² This strategy of analyzing Chinese foreign policy through the statements and public journals of the think tanks is widely acknowledged in the academic literature (see section 2.5.1). One analyst of Chinese foreign policy has stated: “Chinese think tanks are now some of the most important windows through which analysts can observe China’s usually opaque policy-making system.”²⁰³

²⁰¹ Heydon & Woolcock (2009): 233-248

²⁰² Yang (2009)

²⁰³ Tanner (2002)

According to Yang, it is in general hard to analyze the role of domestic politics in Chinese foreign policy. This does not mean that domestic politics plays a less important role in China than in other countries. While the general public is at large not well informed about FTA negotiations, the business sector is influential in these negotiations, according to Yang. The business sector is included both in choosing FTA partners and during actual negotiations.²⁰⁴ Still, their influence is not easily studied, as they do not air their concerns in public.

In general, the Chinese FTA partners are carefully selected, and economic, political and strategic competition plays an important role in these decisions, according to the study of Chinese influential analysts of foreign economic policy.²⁰⁵ The study does not conclude of any one of these factors being the most decisive in Chinese FTA policy, but rather concludes that the analysts often look for FTA partners that can somewhat satisfy all of these concerns (economic, political and strategic).

6.2.2 Economic and strategic competition and the access to resources

China's strategy is partly similar to that of Japan, concerned with gaining political influence in the region and aiming to enhance its influence in the international political economy in general.²⁰⁶ As noted above, economic and strategic competition is important concerns as well. Regarding economic competition, several benefits of negotiating FTAs are identified by Chinese analysts, among which investments are central. According to the studied Chinese think tanks, stimulating Chinese foreign investments is regarded an important part of the "go abroad" strategy. This must be done by helping Chinese corporations gain market access overseas through the FTAs. It is widely recognized among the think tanks that Chinese corporations must become competitive globally, as the opening up of the Chinese economy implies competition from foreign firms. Attracting potential investors, and improving coordination among different economic sectors by mobilizing FTA supporters, is also seen as important benefits. Additionally, the "binding" of the path of economic reforms, for instance through making Chinese command enterprises modernize as they meet competition from foreign corporations, is also identified as important strategic concerns.²⁰⁷

²⁰⁴ Yang (2009): 219

²⁰⁵ In addition to Yang (2009), see also Antkiewicz (2005).

²⁰⁶ Yang (2009), Antkiewicz (2005)

²⁰⁷ Yang (2009): 221-223

In general, economic potential regarding future Chinese investments is noticed by the Chinese analysts in arguing for future FTA partners. One of the very first countries China negotiated a FTA with was Pakistan. This choice was first and foremost politically and strategically motivated, as Pakistan is a very marginal trading partner. Pakistan is identified as an important ally and counter-balance to attempts by the US and Japan to build alliances with India. Another reason identified by the analysts was that Pakistan is neighboring two oil rich areas. Additionally, Chinese analysts have argued that an FTA with Pakistan is important for China based on future economic potential, as Chinese investments in Pakistan is expected to increase substantially in the coming years.²⁰⁸

Also, strategic considerations in the form of ensuring long-term and reliable access to overseas resources and energy are an important reason for choosing FTA partners. The Development Research Center of the State Council of China has raised concern that by 2020 the resource demand will have risen dramatically, while the Chinese per capita possession of resources is far below world average. In metals, the per capita possession is only half of the world average, the Council has stressed.²⁰⁹

In choosing FTA partners, there has been a thorough discussion among analysts as to which partners should be selected. Among the analysts there seems to be consensus that neighboring countries should be prioritized, as well as “countries that either have an economy complementary to China's and are resource-rich, or constitute emerging markets.”²¹⁰

The FTAs China has signed with New Zealand and Chile are comparable in the way that these countries are both small, open economies which can be good subjects for China to practice negotiating FTAs “touching each stone as they cross the river.” One reason for China to prioritize an FTA with Chile, according to Chinese analysts, is the concern of access to energy and natural resources. In this respect Chile's economy is complementary to China's, especially in copper, since China is the world's largest copper importer, and Chile is the world's largest supplier of copper.

New Zealand was chosen due to its early recognition of China and its “One-China” policy, as well as the recognition of China as a market economy and the promotion of its accession to the

²⁰⁸ Yang (2009):226

²⁰⁹ Yang (2009): 224

²¹⁰ Yang (2009): 225

WTO.²¹¹ A similar reason can be found in the Joint Feasibility Study of China and Norway, which in the introduction to the study describes Norway's early recognition of China, and opens with the sentence: "Norway and China enjoy a strong and excellent bilateral relationship."²¹² As good diplomatic relations is one identified reason for China to choose FTA partners, this serves to explain why the diplomatic crisis between Norway and China following the Nobel Peace Prize award in December 2010 has brought the FTA negotiations to a halt.²¹³

China signed initial framework agreements on FTAs with Australia and New Zealand in 2003 and 2004. These state that the parties seek to increase investments between the parties by including comprehensive provisions on investments as well as investment protection.²¹⁴ While Australia was prioritized by the Chinese over New Zealand in the South Pacific, differences on the question of market access on especially agricultural products has left these negotiations at a stalemate since 2007.²¹⁵ Australia is identified as especially important to China with regards to natural resources, and Australian exports to China are primarily iron ore, copper and petroleum.²¹⁶ (New Zealand primarily exports lamb, dairy and forest products to China.)²¹⁷ In the initial framework agreement of the Australia – China FTA it is mentioned that Chinese investments in Australia may be relevant under contracts in the fields of engineering, resources and mining development projects.²¹⁸

In both New Zealand and Australia there has been opposition groups to the FTAs, but these are more marginalized than the opposition groups in for instance India and Japan, according to one study. New Zealand and Australia have had strategies to integrate economically with China to

²¹¹ Ibid., Antkiewicz (2005): 1550

²¹² NHD (N.D.)

²¹³ The 9th round of negotiations were originally scheduled for December 2010, but were cancelled when the Nobel Peace Prize was awarded. As of late April 2011 no new date for the 9th round of negotiations has been agreed, according to the Norwegian Chief Negotiator (e-mail correspondence, 26. April 2011).

²¹⁴ Antkiewicz (2005): 1547 - 1549

²¹⁵ Yang (2009): 229

²¹⁶ Antkiewicz (2005): 1549 - 1552

²¹⁷ Ibid.

²¹⁸ Antkiewicz (2005): 1548

gain from their economic development.²¹⁹ In New Zealand the authorities have stressed that they wish to be the first developed country to sign an FTA with China (while Norwegian authorities have stressed that they wish to be the first European country).

As for the choice of Norway, Norway could possibly score points in all of the identified areas (strategic, economic and political). It seems that the same reasons for negotiating with New Zealand has been important, being a small country with which China has a long tradition of co-operation. This implies that Norway is a good subject for the Chinese to practice FTA negotiations, before negotiating with larger and more powerful developed countries.²²⁰ Also strategic and economic concerns regarding market access and the supply of technology and natural resources, like for instance oil and metals, could also plausibly be reasons for China to negotiate with Norway.

6.3 Chinese policy on investment agreements

In addition to FTAs, China has signed a large number of BITs in recent years, defining the rights and duties of foreign investors in China, and the rights and duties of Chinese corporations investing in the partner country. By mid-2008 China had signed BITs with 126 states,²²¹ and China is indeed successful in attracting foreign investors. Since 2002 China has been the single country in the world attracting most FDI per year. New BITs are now being negotiated between both China and the US, and China and the EU.

As opposed to Norway, China has an official and publicly available model BIT²²² that makes Chinese positions on investment protection publicly accessible. The Chinese model BIT, dated 1997, is to a large extent similar to the typical European investment agreements.²²³ For the most part it contains the standard provisions found in modern BITs, although it has some “Chinese characteristics”. It also includes provisions on external investor/state arbitration through the ICSID tribunal (the World Bank arbitration tribunal on investment disputes). China became a member of ICSID only in 1993, and although the model agreement is from 1997, China has only recently started to negotiate agreements with ICSID arbitration. Today China has signed several

²¹⁹ Liou (2007): 228

²²⁰ Interview 09.05.2011

²²¹ Gallagher and Shan (2009): 1.01

²²² This can be found in an English translation in Gallagher and Shan (2009): Appendix IV

²²³ Gallagher and Shan (2009): 1.83 – 1.90

agreements containing such provisions, and also the FTA between New Zealand and China, signed in 2008, includes a chapter on investment protection and external investor/state arbitration through ICSID.

In general, BITs are becoming still more important in the development of China's external investment relations.²²⁴ While China has had reservations to enter such agreements, this changed in the late part of the 1990s, when China took part in a general rapid development and change in the investment treaty regime. It was an observable trend that the Chinese reservations to enter into agreements with comprehensive investor/state dispute settlement, and national treatment for foreign investors, was left behind. China entered several agreements with such contents, especially through BITs with Germany, the Netherlands and Cyprus.²²⁵

While the Norwegian government has claimed that developing countries are generally active in pursuing BITs in order to attract foreign investors to invest in their countries, a review of Chinese investment treaties concludes that China is negotiating these agreements in order to protect their own foreign investments.²²⁶ To do so, they are including comprehensive rights of the investors to take investor-state disputes to international arbitration after only a three month review process.²²⁷ This, according to the comprehensive study of Chinese BIT policy, is primarily a consequence of China becoming one of the largest capital exporters in the world, with large investments in for instance Sub-Saharan Africa (mainly production of oil in Angola, Chad, Nigeria and Sudan).²²⁸ These increased investments should also give rise to disputes involving Chinese corporations, and in February 2007 the first case involving a Chinese corporation was filed in ICSID, the case of *Tza Yap Shum vs. Peru*, which is still pending.²²⁹

In general, the Chinese BITs are of the type of investment agreements focusing on protection of investments, and China has been reluctant to enter into investment treaties including admission

²²⁴ Gallagher and Shan (2009): 9.01

²²⁵ Gallagher and Shan (2009): 9.02, 9.05

²²⁶ Gallagher and Shan (2009): 9.03

²²⁷ This is in contrast to the proposed Norwegian model BIT, which includes a three year period of trying out the local legal system before a dispute can be subject to international arbitration

²²⁸ Gallagher and Shan (2009): 9.03

²²⁹ Gallagher and Shan (2009): 9.03, and ICSID webpages: www.worldbank.icsid.org.

of investments, i.e. giving foreign investors rights of market access.²³⁰ This could possibly be changing as a consequence of the ongoing negotiations for a China-US BIT, which was commenced in 2008 after 17 months of exploratory discussions.²³¹ In general US/NAFTA BITs give investors rights regarding market access by extending the provisions on national treatment and Most-Favored-Nation (MFN) treatment to the pre-establishment phase. This is either based on positive or negative listing, i.e. mentioning which industries are subject to these provisions, alternatively which industries are *not* subject to such provisions (the former being the most cautious approach.)²³²

While the US-China BIT is still under negotiation, and these negotiations have proven difficult, the first concrete obligations on investment admission in Chinese investment treaty history have actually become evident in the FTA between China and New Zealand.²³³ While this FTA does not include market access regarding national treatment, it does, in a subtle manner, give investors some rights in the pre-establishment phase. This is done by including natural persons in the definition of investors ("investments of investors of the other party" and "investors of the other party"), then, in a footnote, stating that the provisions on MFN and Transfer applies to "the establishment of investments."²³⁴ This is the first time a Chinese BIT has expressively granted freedom of transfer with regard to pre-establishment transfers. Such provisions has led to questions of whether or not pre-investment expenditures should be considered an "investment" protected by BITs, and several ICSID cases are being tried on this issue, for instance cases against Sri Lanka, Georgia and the Czech Republic.²³⁵

6.3.1 BIT policy of other emerging economies

The BIT policy of other emerging economies is only briefly examined in this study. Indian TNCs have just recently started investing abroad to a large extent (see section 2.5.1), and less so than China and Brazil. Still, the outward FDI of India is increasing very rapidly. India has also been

²³⁰ Gallagher and Shan (2009): 9.08

²³¹ Gallagher and Shan (2009): 9.09

²³² Report in appendix to the hearing letter, which can be found at: NHD(2008), Gallagher and Shan (2009): 9.08, 9.09

²³³ Gallagher and Shan (2009): 2.106

²³⁴ Ibid.

²³⁵ Gallagher and Shan (2009): 2.107

active in negotiating bilateral investment agreements. As of July 2010 India had signed 83 BITs²³⁶ (in comparison China had signed 126 BITs mid-2008). These BITs have been signed throughout the latter part of the 1990s and the 2000s, with no particular shift following the recent activity of Indian TNCs abroad. Although their motivations on negotiating BITs are not studied in detail, this would imply that India has signed many of its BITs with the motivations of attracting FDI from foreign investors. The fact that the Norwegian government in 2007 noted that India had earlier asked Norway for a BIT (see section 6.1), could then imply that the motivations of India was primarily to attract Norwegian FDI, since these requests were made before the boost of Indian outward FDI.

While China and India have signed a long list of BITs, Brazil is a different story. Although Brazil is more important as a host country to Norwegian FDI than China, according to the interviewed informants in this study (see section 4.1), the Norwegian government has not changed its BIT policy towards Brazil. This dilemma has a simple answer, as Brazil does not negotiate BITs at all. Brazil has signed 15 BITs in total, all signed in the 1990s and before the controversies surrounding the MAI agreement. Like Norway, Brazil abstained from negotiating BITs as a consequence of these controversies. Reportedly, they are still today concerned with many of the provisions in the US style of BITs.²³⁷ Although it is a simple answer, it tells us one thing: It is not only the push of domestic constituents and corporate interests that determine the Norwegian policy on bilateral investment agreements, but also the policies and interests of the negotiating partners. In the same line of argument, the leaked internal memo shows that the Norwegian government is responsive to the requests of other countries.

6.4 Chinese interests in Norway?

As noted above, Chinese analysts have, as part of their motivations to negotiate FTAs, been concerned with access to resources and energy, especially metals. In selecting FTA partners resource rich countries who match Chinese demands have been prioritized. While generally protecting investments, China in their first FTA with a developed country has also included some provisions on market access. In the following, it is discussed whether China has a possible interest in negotiating investment provisions with Norway.

²³⁶ See a list of India's signed BITs in UNCTAD (2011)

²³⁷ Investment Treaty News (2009)

6.4.1 The Purchase of Elkem

In January 2011 Norwegian corporation Elkem was purchased by Chinese corporation China Bluestar. Elkem is one of Norway's largest industrial companies, and is producing metals and materials such as aluminum, silicon and carbon, and produces hydroelectric energy both in Europe and North America. An interviewed former senior vice president of Elkem explains the Chinese motivation for purchasing this corporation mostly as getting access to technology and management skills:

“The Chinese see the need to invest in more than just state bonds, and they might as well purchase corporations who have technology or management skills they can make use of in China. Elkem is good on energy-efficient production, and has a lot of experience in the recycling of energy. With the Chinese take over of Elkem, the Norwegian management in Elkem has been appointed to manage several Chinese factories as well.”²³⁸

In general, three major motivations for the Chinese purchase of Elkem have been identified among the informants in the Norwegian business sector interviewed in this study, namely technology transfer, gaining market shares, and gaining experience in a Western market.

6.4.2 Who's next?

There is broad agreement among the interviewed informants in the large Norwegian corporations, as well as in NHO and LO, that the purchase of Elkem was not a single occurrence. They stress that there is no doubt that Norway will see more Chinese purchases of Norwegian corporations in the time to come. The interviewed trade director in NHO said:

“There has not been a large debate in Norway on the purchase of Elkem, it is widely accepted and that is a good thing. Still, while NHO are in general positive to Chinese ownership in Norway, you also need to be aware of the close ties between commercial actors and the communist party in China. They do have a “go abroad” strategy, and they have started the march, in Africa but also in Europe. Because of this Western government will have some concerns as to whether these are commercial investments or politically motivated – a debate similar to that of the Sovereign Wealth Funds - attempts to ensure that commercial and diplomatic interests are not mixed.”²³⁹

According to several informants it is hard to say if the Chinese have any strategic industry in mind (and which), or if they will just take the opportunities as they come. One informant said that possible Chinese take-overs could be expected in the fertilizer industry (Yara), oil (especially offshore technology) and the aluminum sector. The informant stated that China may attempt to

²³⁸ Interview 14.03.2011

²³⁹ Interview 09.02.2011 (My translation)

become self-sufficient in fertilizer production. Another informant said that it is only in the oil and rig industry that Norwegian corporations have a size that implies that they are the ones that buy up other corporations. And that in several of the traditionally large areas, as for instance the metals industry, the Chinese corporations are growing faster than for instance Hydro. In general, several informants said that the Chinese are moving into processing markets, adding more value to the products. In the oil and gas industry the interviewed informants stated that the Chinese firms are very active in buying up corporations as they have a lot of financial backing from the state. These firms have been especially active during the financial crisis, which was used as an opportunity to get access to foreign energy resources.

6.4.3 Investment or trade

While there is consensus among the interviewed informants that it is important to the Chinese state to ensure access to resources, the perceptions of whether or not this will be done through investments differs among Norwegian business interests. The trade director in NHO argues that while China has a clear strategy and policy to ensure the access to natural resources, as they do not have a lot of natural resources themselves, the Chinese are convinced that they can get these resources through trade: “We are selling them oil and metals, and the gas market is becoming still more global with the LNG²⁴⁰ ships.”²⁴¹

On the other hand, the interviewed informant in Hydro is convinced that the Chinese follow a well known strategic plan to start with trade, then taking over shares when they do not gain more from this trade (see section 5.3). The purchase of Elkem is an example of this, according to the informant, who states that Orkla is sitting on markets the Chinese want.

6.5 The China-Norway power relationship

In general, China is a more important trading partner to Norway than vice versa. This implies that China is more powerful in the bargain, as a consequence of the fact that China has more resources than Norway in the sense that they have a larger economy. It also implies that China has a lower cost of no-agreement than Norway. Consequently, Norway should be expected to accept more compromises to their perceived national interests than China, since China would be more prone to leave the negotiating table than Norway. As a consequence of their institutional models and positions in the global economy it should also be expected that China drives a harder

²⁴⁰ Liquefied Natural Gas. This technology makes the transport of gas independent of gas pipes, as the gas can be transported by ship.

²⁴¹ Interview 09.02.2011

bargain in the negotiations than Norway, according to the theoretical framework presented in this study. In addition to the coercive power of China in the actual negotiations, the institutional power of China should also be considered, i.e. the power to decide the conditions the other part is operating under. The China-Norway FTA negotiations is the first time Norway has negotiated without the EFTA parties, besides from a FTA with the Faroe Islands signed in 1992. This break-up of EFTA has been intended by China according to the interviewed informant in NHO. Looking at ongoing Chinese FTA negotiations, it becomes evident that China is in fact negotiating with all EFTA parties (except from Liechtenstein). Thus, it seems that China has a strategy to split up EFTA and negotiate bilaterally, something that strengthens the power of China additionally in the negotiations. The interviewed informant in the NHO stated that: “While NHO in general is reluctant to see Norway negotiate alone, outside EFTA, we accepted this due to the fact that China refused to negotiate with EFTA as a group, but wanted bilateral negotiations.”²⁴² The processes surrounding the Joint Feasibility Study, which is important in terms of agenda-setting, has not been studied due to limited access to data.

6.6 Chapter summary

While a leaked internal government memo shows that India has previously asked Norway for a BIT, it cannot be concluded in this study whether or not China has asked for a change in Norwegian BIT policy in the ongoing FTA negotiations. General findings in this chapter’s analysis of China’s FTA and BIT policy, paired with statements of interviewed informants in the Norwegian business sector, implies that China could have identified interests in negotiating investment provisions in the FTA with Norway. This is especially relevant in lines of China’s economic concerns of ensuring access to natural resources and markets. This study finds that the perception of Norwegian business interests differ across industries on the question of whether or not the Chinese will attempt to get this access through investments or trade.

In general, the primary reason that China is one of the world’s most active countries in negotiating bilateral investment agreements is not that China is concerned with attracting FDI. Rather, it should be interpreted as a concern with protecting the investments of Chinese corporations abroad, as a consequence of China’s “Go abroad” strategy. While China has so far only negotiated one bilateral FTA with a developing country (New Zealand), this includes some investment provisions on market access. This could possibly be a result of Chinese strategies to negotiate bilateral FTAs with countries that are complimentary to China’s economy, and resource

²⁴² Interview 09.02.2011

rich. In Norway, the interviewed business interests assess that China may especially be interested in investing to ensure access to metals, especially aluminum (mining). As mentioned previously, mining as well as the oil and gas industry is by far the industry that has been included in most cases of arbitration through ICSID (section 5.4). Other strategic industries mentioned among the interviewed informants are offshore technology and production of fertilizer.

Chapter 7: The failure of multilateralism

This chapter argues that the general change in Norwegian BIT policy should partly be understood in terms of systemic changes in the global trade and investment regime. As data on the motivations of Norway to negotiate this agreement with China has not been available (as it is not discussed in parliament and the possibility for interviews has been limited), this is discussed through an analysis of the general development in the international regime, giving special attention to the changing role of EFTA.

7.1 Norwegian bilateralism

In recent years, there has been an almost explosive rise in the number of bilateral Free Trade Agreements (FTAs) in the world, as a consequence of a stalemate in the multilateral regime.²⁴³ The Doha-round of the WTO is still not finished after ten years of negotiations. Consequently, there is currently a strong trend that countries or blocks of countries negotiate agreements on trade liberalization bilaterally, in order to liberalize trade and investment rules further than the rules in the existing WTO framework. These agreements are often negotiated between one or more developed countries, and one or more developing countries, but a recent trend is that developing countries are negotiating these agreements with each other. In addition, it is a general trend that bilateral FTAs are becoming still more comprehensive, including policy that cover still more areas of society. In the ongoing negotiations between Norway and China trade in goods and services, intellectual property rights, investment protection, non-tariff trade-barriers, and sustainable development in the form of regulations on environment and workers rights are all subject to negotiations, according to the Joint Feasibility Study of the parties.²⁴⁴ The same is true for the negotiations between India and EFTA.

In Norwegian trade policy as well, the bilateral FTAs have become a main priority. In recent years Norway has been pursuing such agreements with countries like India, Columbia, Ukraine, Vietnam and Russia, in addition to China. Traditionally, Norway negotiates such agreements as part of the European Free Trade Association (EFTA), together with Switzerland, Iceland and Liechtenstein. The ongoing negotiations with China are different in that matter, since Norway is negotiating this agreement without the EFTA partners. Aside from a bilateral FTA between

²⁴³ Heydon and Woolcock (2009)

²⁴⁴ NHD (N.D.)

Norway and the Faeroe Islands from 1992, this is the first time Norway negotiates such an agreement alone. This implies that Norway can define its positions more freely, without having to negotiate these positions with the other EFTA-members.

7.2 The threat to EFTA

The ongoing trend of bilateralism in FTAs is not only a decline in multilateralism, but should also be interpreted as a decline in regionalism, as still more countries are negotiating bilateral agreements with countries outside of their regions. This is one of the main findings in the thorough assessment of American, European and Asian approaches to bilateral FTAs conducted by Kenneth Heydon and Stephen Woolcock.²⁴⁵ As a consequence, the EFTA cooperation that Norway usually negotiates trade deals with, is facing its most existential threat since several central EFTA members joined the European Union in 1994.²⁴⁶ This new period of declining regionalism, which is termed the fourth phase of EFTA, can possibly split up the alliance to negotiate bilaterally, according to Heydon and Woolcock. This makes all differences in positions and interests more problematic than earlier, as the EFTA states are inclined to rather negotiate alone than to compromise important policies. EFTA has an Asia strategy motivated by gaining market access, and business lobbies have strong influence as to which partners to negotiate with (see section 6.4). Due to the rise of bilateralism EFTA will have to compete for the attention of potential partners, who might be more interested in larger markets. As the stakes are higher in negotiating with large partners, the member states may prefer negotiating without the EFTA partners.²⁴⁷ This also means that compromises to the economic interests of individual member states are less likely than earlier. The more strategic and political long-term goals of cooperating in order to strengthen the power of the EFTA states in a world of bilateralism is then challenged.

This threat to EFTA is also identified by the Norwegian government, in the before-mentioned leaked internal memo on preparing a public hearing on a model BIT. There is a worry that common EFTA negotiations with India will be challenged, if Norway demands that investments are not included. Still, while this is used as an argument in relation to the model agreement, the fact that this Norwegian model BIT (which is officially shelved, but used as a background for the FTA negotiations with China and India) is less extensive on investors right than that of Switzerland, leaves the Norwegian interest groups to demand that Norway and India negotiate a

²⁴⁵ Heydon and Woolcock (2009)

²⁴⁶ Heydon and Woolcock (2009): 174-175

²⁴⁷ Ibid.

separate BIT. This demand is based on the concern that Norwegian investors will otherwise be granted fewer rights in India than the corporations of the EFTA countries.

While Norway is worried about challenges to EFTA, it has still accepted to negotiate the FTA with China bilaterally. According to the interviewed informant in NHO this has some advantages as Norway can make its own priorities. Still, it is also seen as more dangerous by the business interest group, as Norway stands alone against a tough negotiating partner. In general, NHO recommends Norway not to “go alone”, but this recommendation was foregone in relation to China. The reason for this is that this FTA is important to the Norwegian business sector, and bilateral negotiations were the only possibility to get a formalized cooperation with China, according to the informant.²⁴⁸

7.3 Pressure of the EFTA partners

Norway's partners in EFTA have also put pressure on Norway to change its BIT policy. This seems to have led to policy changes. According to the informant in NHO, it has been a problem in EFTA that Norway could not take part in the investment chapter with Korea. This forced the remaining EFTA partners to negotiate separate BITs with the country. This has been criticized from the partners, from Switzerland and Iceland specifically, and the informant in NHO describes this as an “embarrassment” to Norway. This has also been criticized from the Norwegian business sector, in addition to the EFTA partners.

According to the interviewed informant in the Norwegian Ministry of Trade and Industry, this pressure from EFTA explains why the government decided to set down a committee to prepare a proposal for a Norwegian model BIT. As there had been a continuous pressure from EFTA ever since Norway stopped negotiating these agreements in the mid-1990s, the Government finally decided that this had to be resolved. The Norwegian government had for a long time said in EFTA that this was under discussion internally in Norway. Eventually, at a ministerial meeting in EFTA, Norway stated that it would now look at its positions.

7.4 Bilateralism is second best

While larger countries, and their corporations, can gain from bilateralism, the Norwegian corporations agree that multilateral agreements are the best solution. The interviewed informant in Telenor assess that the failure of multilateralism leaves them with worse conditions than other corporations, as Telenor does not expect Norway to get as good bilateral investment agreements

²⁴⁸ Interview 09.02.2011

as the EU and the US. As a result, they are worried that competitors may get better conditions than them in the competition for market access in India. The interviewed informant in Telenor states: “If, for instance, other international mobile operators like Vodafone would get an agreement granting them market access exceeding the 74 percent that have generally been opened to foreign investments, that could imply a competitive disadvantage for us.”²⁴⁹

In general, the Norwegian Transnational Corporations are expressing that, as global institutions investing in a large number of countries, the bilateral agreements are less important to them. They also view multilateral agreements as more robust and more disciplining than bilateral agreements, while acknowledging that this is second best as long as the multilateral framework is at a stalemate.²⁵⁰

7.5 Chapter summary

The change in Norwegian BIT policy could somewhat be seen as a result of the failure of multilateralism in the global trade and investment policies. Norway is probably fearing that without this policy change, the trend of bilateralism will be strengthened, leaving Norway less powerful internationally. With EFTA being more vulnerable as a consequence of declining regionalism, this may have pushed Norway to change its BIT policy. While this could explain why the Norwegian government has included investment protections in the FTA negotiations with India, which Norway negotiates as part of EFTA, this does not, however, explain why Norway is negotiating these provisions with China, where Norway is negotiating *without* the EFTA partners.

²⁴⁹ Interview 23.03.2011

²⁵⁰ Interview 10.03.2011, Interview 11.03.2011, Interview 14.03.2011, Interview 23.03.2011

Chapter 8: Conclusion

The change in Norwegian policy on bilateral investment agreements should not only be understood as a change in Norwegian domestic corporate interests. It should also be seen in light of the changed powers and interests of emerging economies. This is the main findings of this study. The emerging economies are no longer primarily initiating investment agreements in order to attract foreign investments. Rather, they are concerned with protecting the foreign investments of their corporations abroad, as well as gaining market access. This push of the emerging economies is welcomed by the Norwegian business sector, especially the telecoms industry. The actors in the Norwegian government who are motivated to change this policy due to systemic challenges stemming from the rise of bilateralism in general, are also expectedly welcoming this push. Whether or not the policy change will be materialized in actual bilateral agreements remains to be seen. The actors who have previously blocked this policy change are less active due to the party-political composition of the government in power and the secrecy in Norwegian bilateral trade policy. Still they may become more active at the time of ratification, as a consequence of a possible change in the party-political composition of the government, as well as concerns with Chinese investments in Norway.

Among the domestic corporate interests in Norway, the telecoms industry (Telenor) is active in pushing for a general change of policy. This is due to the structure of competition in the industry, as well as Telenor's past and present bad experiences with investment disputes in emerging economies. This is especially relevant for the Norwegian policy change towards India. On the other hand, as the Chinese telecom sector is at large closed to foreign investors, the telecoms industry has not pushed this policy change towards China. While the interest group of the business sector (NHO) as well as the Norwegian government, claims that Norwegian TNCs need and push this policy change, this is a truth with great modifications. In general, Norwegian investments in China are limited, and the Norwegian corporations show more interest in investments in other emerging economies. Although corporations in the oil/gas and aluminum industries are increasing their investments in new areas in China, these corporations generally perceive the Chinese investment framework as stable and foreseeable, compared to the investment framework of for instance India. In the study it is found that the large Norwegian TNCs are not very occupied with investment protection agreements in general, and especially not with an investment agreement with China.

The domestic corporate interests in Norway have good channels to influence public policy. There is arguably a case of bureaucratic capture between the Norwegian Ministry of Trade and Industry and the Norwegian business sector, implying that they are primarily attending to the offensive interests of Norwegian constituents. It is also found in this study that there is a discrepancy between the statements of the business interest organizations and the large corporations, implying that the business lobby is advocating a policy change that is less important to the corporations they are advocating for.

Previously the defensive interests have blocked a Norwegian policy change partly by keeping this issue off the agenda of policy makers. These interests are not as active as earlier, due to the party-political composition of the government in power. The political parties that have previously blocked policy change are now part of the governing coalition. The trade union is not following this issue due to their faith in the government in power. In general, it is uncertain if the trend of including bilateral investment agreements in FTAs will continue, due to the controversies surrounding them. In Norway it is too early to say if the policy change will become manifest in the actual agreement with China. At the time of ratification defensive actors could be activated, as the content of the negotiated agreement becomes public. More so if there is a change in the party-political composition of the government in power. “New” defensive interests could also be activated in the case of future controversial Chinese purchases of Norwegian industries, in the Norwegian business sector as well as in the trade unions and the existing government coalition. On the other hand, the fact that these provisions are now included in a FTA with China may strengthen the possibilities of a manifest policy change, as this multi-issue FTA is important to a wider specter of offensive interests than that of only the BIT provisions, along the lines that a multi-issue negotiation gives the Norwegian negotiators a wider range of possible strategic alliances.

It has not been possible to get a certain answer as to whether or not China has asked Norway to change its policy on investment agreements. In general, this study finds that Norway is responsive to requests made from other countries, e.g. to a request from India. The Norwegian government has argued that a policy change is requested by developing countries in order to increase the foreign direct investments in to these countries. Consequently, the government has argued that the Norwegian policy change should be seen in light of a general development policy, with an aim to fight poverty in developing countries by increasing private investments. For the developed countries with high growth rates and emerging market economies this is not a correct picture, particularly with respects to China. China is one of the leading capital exporters in the

world, and is negotiating BITs in order to protect the foreign investments of Chinese corporations. China has also included investment provisions in FTAs. The only existing FTA between China and a developed country, the China-New Zealand FTA, includes provisions on investments that include both the protection of investments and market access. When choosing FTA partners, especially outside of their region, Chinese foreign policy analysts emphasize strategic and economic motivations, i.e. getting access to new markets and natural resources, especially minerals.²⁵¹ Still, in the Norwegian business sector the perception of whether or not this is primarily done through trade or investments vary. In general it is emphasized among Chinese analysts that increasing foreign investments of Chinese corporations by assisting them in getting market access abroad is an important motivation for the Chinese FTAs (the “Go abroad” *Zou chu qu* strategy). The power relationship between Norway and China imply that China is the most powerful part in the negotiations. The power of China in the relationship has been strengthened by the fact that China has demanded to negotiate with each EFTA member state bilaterally.²⁵² The fact that the Norwegian government and business interests have been willing to forego their general policy of multilateralism in order to meet this demand also implies that China is powerful in this bilateral relationship.

Norway is negotiating trade and investment agreements in a global context of rising bilateralism, which is also challenging the EFTA partnership. In this study it was found that the Norwegian business sector is particularly influential in bilateral trade and investment policies. This is also true for the remaining EFTA countries. These corporate interests are pursuing FTAs with the large emerging economies, and ready to forego EFTA and negotiate bilaterally in order to get the most profitable deal. In this study this was found to be true for Norwegian business interests as well. This is a challenge to EFTA as well as to Norway, as a small power and a self-declared multilateralist state. This has been a motivation for the Norwegian government to change its policy on investment protection towards India. Still, Norway has been willing to forego their general policy of multilateralism in the negotiations with China. This means that the pressure of EFTA and the conceived challenges of bilateralism are not explaining why the Norwegian government has included China in the policy change on investment agreements, exactly because this is a bilateral negotiation.

²⁵¹ In May 2011 the Norwegian government announced that the Norwegian Ministry of Trade and Industry will work out a strategy for the Norwegian minerals industry, due to the increasing demand for minerals from China specifically. NHD (2011)

²⁵² This is the clear perception of the interviewed informant in NHO (see section 7.2)

This thesis does not attempt to give a certain answer to when and how the FTA negotiations between Norway and China will continue. Although diplomatic and political relations are important for China's motivation to negotiate FTAs, economic concerns are important as well. During the time of diplomatic crisis, the exports from Norway to China have increased with 25 percent.²⁵³ In March 2011 China's largest bank ICBC²⁵⁴ (which is state-owned) initiated a meeting with the Norwegian Embassy in Beijing to discuss a possible Norwegian branch of the bank, allegedly aiming to increase Chinese investments in Norwegian shipping and energy industries.²⁵⁵ This implies that the diplomatic sanctions are not overruling Chinese economic interests. As long as the economic motivations of China (e.g. to get access to markets and resources) in the FTA negotiations with Norway are important enough, the FTA negotiations will be resumed.

Norway is a late comer on the issue of bilateral investment agreements, and negotiating with new emerging powers. The general developments imply that these agreements are generally becoming more mutual. Developed countries should expect to see themselves as subjects to arbitration in investment disputes. The changing geo-political power scene implies that the negotiating partners should not be viewed only as host countries of developing countries' FDI, but as powerful states with offensive interests in investing abroad. It is unanswered if we are "so dominated by Western influence that we simply do not understand the world."

²⁵³ Aftenposten (2011b)

²⁵⁴ Industrial and Commercial Bank of China

²⁵⁵ Aftenposten (2011c)

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Appendix 1: List of interviews

Berg, Harriet. Vice President, Head of Government Relations, Telenor Group. Interviewed March 23, 2011. (Not taped).

Brath, Christine Frogner. Head of section, strategy and industry analysis, Hydro, and former board member of Norwegian Chinese Chamber of Commerce, Interviewed March 10, 2011. (Not taped).

Bøckman, Harald. Sinolog, researcher at Centre for Development and the Environment (SUM), University of Oslo. Interviewed May 9, 2011. (Not taped).

Bøe, Monica. Senior Analyst, Latin America and China, Political and Public Affairs, Statoil. Interviewed March 11, 2011.

Bøhn, Diis. Senior Advisor on trade agreements and Asia, International Department, Norwegian Confederation of Trade Unions (LO). Interviewed February 22, 2011.

Ghezelbash, Ali. Communication Manager Europe and Asia, Development and Production International, Statoil. Interviewed March 11, 2011.

Hovland, Ragnar. Senior Vice President, Communications and Public Affairs, Orkla ASA. Until January 1 2011 held the position of Senior Vice President of Energy and Public Affairs at Elkem. Interviewed March 14, 2011.

Norum, Margrethe. Advisor on investment agreements, section of trade agreements, Norwegian Ministry of Trade and Industry (NHD). Interviewed March 1, 2011.

Sørli, Knut. Director of trade politics, The Confederation of Norwegian Enterprises (NHO). Interviewed February 9, 2011.

Appendix 2: Complaint to NHD

Til:

Nærings- og Handelsdepartementet

Oslo, 24. januar 2011

Klage over hemmelighold

Jeg viser til avslag på krav om innsyn i det norske forslaget til investeringsbeskyttelseskapittel i forhandlingene om en frihandelsavtale mellom Norge og Kina, dokument 8 i sak 201001941. Avslaget er hjemlet i offentleglova § 20, 1.ledd bokstav b som gir rett til unntak ”av omsyn til Norges utenrikspolitiske interesser”, med henvisning til at ”opplysningane er mottekne under føresetnad av eller det følger av fast praksis at dei ikkje skal offentleggjerast”. Jeg ønsker å påklage avslaget.

Norge har ikke siden midten av 1990-tallet forhandlet om investeringsbeskyttelse i bilaterale handelsavtaler. I regjeringserklæringen for perioden 2009 – 2013 (Soria Moria II), åpner regjeringen for at det kan forhandles om bestemmelser om investeringsbeskyttelse med fire land, heriblant Kina. I 2008 sendte regjeringen en modellavtale for norske investeringsbeskyttelsesavtaler ut på høring. Flere høringsinstanser var kritiske til modellavtalen. Denne har ikke siden blitt behandlet, og dermed er det uklart hva som er den norske regjeringens posisjoner på investeringsbeskyttelsesbestemmelser i dag. Det er i offentlighetens interesse at regjeringens posisjoner gjøres kjent, for å oppnå en åpen og inkluderende offentlig debatt om saken. I motsetning til dette, er en kinesisk modellavtale for investeringsbeskyttelse offentlig tilgjengelig.

Jeg tillater meg å minne om formålsparagrafen (§ 1) i offentleglova, som gir klare føringer for hvordan loven skal praktiseres: *”Formålet med lova er å leggje til rette for at offentlig verksemd er open og gjennomsiktig, for slik å styrkje informasjons- og ytringsfridommen, den demokratiske deltakinga, rettstryggleiken for den enkelte, tilliten til det offentlege og kontrollen frå ålmenta. Lova skal òg leggje til rette for vidarebruk av offentlig informasjon.”*

Lovgiver har lagt til grunn at de hensyn som er nevnt § 1 skal tillegges vekt som tolkningsmoment og ved tolkningstil, jf. Innst.O.nr.41 (2005-2006) punkt 2.2:

”Komiteen viser til at en formålsbestemmelse først og fremst har betydning som en programerklæring og målsetning for loven. Men komiteen vil fremheve at den også har en viktig betydning når det er tolkningstil i forhold til andre bestemmelser i loven. Ved tvil om tolkning skal en prinsipielt sett falle ned på det som er mest i tråd med formålsparagrafen. Komiteen vil påpeke at man i forslaget til formålsbestemmelse mangler det viktigste og mest åpenbare formålet med loven, nemlig å skape tillit til forvaltningen.”

I Justisdepartementets rettleiar er det videre presisert at unntak for opplysninger av hensyn til Norges utenrikspolitiske interesser, er ”presisert og snevra inn” sammenlignet med offentlighetsloven av 1970 (jf. s. 126).

Videre vil jeg minne om at unntak begrunnet bokstav b forutsetter at de etterspurte opplysningene er mottatt under forutsetning av at de ikke skal offentliggjøres eller det følger av fast praksis at de skal holdes hemmelig. Jeg ber om en nærmere angivelse av hva som er

grunnlaget for at organet mener det foreligger en slik forutsetning. Jeg viser her til offentleglova § 31(2) som gir rett til utvidet begrunnelse ved avslag.

Dersom organet mener forpliktelsen til hemmelighold følger av fast praksis, ber vi om at organet tar følgende utdrag fra Justisdepartementets rettleier (s. 132-133) med i sin vurdering:

"Kravet om at unntak må være påkrevd, vil likevel i praksis føre til at det oftare ikkje vil vere høve til å gjere unntak der det ligg føre ein fast praksis enn der det gjeld ei folkerettsleg plikt til hemmelegald (første ledd bokstav a). Ei rekke statar fører no ein meir open utanrikspolitikk. Dette påverkar internasjonal praksis. Jamvel om det framleis ligg føre ein internasjonal praksis på eit område, vil det dermed ikkje i alle tilfelle vere fare for skadeverknader dersom det blir gitt innsyn i opplysningar som er omfatta av ein slik praksis."

Det er videre et krav at unntak må være *påkrevd* av hensyn til Norges utenrikspolitiske interesser. Ut i fra ordlyden er det altså ikke nok at det er ønskelig eller mest hensiktsmessig; unntak må være påkrevd. Justisdepartementet forklarer det slik på s.128 i sin "Rettleder til offentleglova: *"At unntak må være «påkrevd» inneber at det må eksistere ei verkeleg fare for at innsyn kan gje skadeverknader av eit visst omfang for norske utanrikspolitiske interesser. Fjerntliggjande og små farar for skadeverknader er ikkje tilstrekkeleg."*

Jeg kan ikke se at departementet har vist til noen fast praksis for å unnta de etterspurte opplysninger. I motsatt tilfelle ber jeg om grunnlaget for denne praksisen.

Om det eksisterer et grunnlag for å holde tilbake opplysninger, er departementet forpliktet til å foreta en merinnsynsvurdering etter § 11, og unntak må være *påkrevd*. Samlet betyr dette en høy terskel for å nekte innsyn. Jeg kan ikke se at departementet har godtgjort at unntak er påkrevd. Videre er dette som nevnt over opplysninger av betydelig offentlig interesse, både fordi det er en oppfølging av løfter fra Soria Moria, og fordi modellen er omstridt og det er uklart hva som er den norske regjeringens posisjoner på investeringsbeskyttelsesbestemmelser i dag.

Jeg ber om at innsynskravet vurderes i lys av dette, og at det foretas en ny vurdering av om det foreligger et reelt og saklig behov for unntak som veier tyngre enn offentlighetens krav og behov for innsyn i denne type opplysninger.

Jeg mener prinsipielt dette er opplysninger samfunnet har krav på, og fastholder mitt krav etter offentleglova. Hvis departementet fastholder sitt syn, ber jeg om at innsyn vurderes etter prinsippene i forvaltningsloven § 13d. I forbindelse med at jeg skriver min masteroppgave i statsvitenskap om investeringsbeskyttelsesbestemmelser i bilaterale handelsavtaler, er de norske posisjonene i forhandlingene med Kina av interesse. De seneste årene har forskere gjennomført komparasjoner av ulike lands posisjoner i bilaterale handelsavtaler, og under veiledning av professor i statsvitenskap Helge Hveem, ønsker jeg å bidra på dette feltet. Hveem samarbeider blant annet med professor Stephen Woolcock ved London School of Economics, som har vært ledende i en omfattende studie av ulike land og regioners posisjoner i bilaterale handelsavtaler. Jeg ber derfor om at departementet også vurderer mitt innsynskrav opp mot det faktum at det skal brukes til forskning.

Med vennlig hilsen,

Emilie Ekeberg

Masterstudent i statsvitenskap ved Universitetet i Oslo

Kopi: Presseforbundet, Offentlighetsutvalget

Appendix 3: Reponse NHD



Emilie Ekeberg
emilie.ekeberg@gmail.com

Deres ref

Vår ref
201100353-2

Dato
8.2.2011

Klage på avslag på begjæring om innsyn – fornyet vurdering

Vi viser til e-post av 24. januar 2011 vedrørende klage over avslag på begjæring om innsyn i dokument nummer 8 i sak 201001941 om det norske forslaget til investeringsbeskyttelseskapittel i forhandlingene om en frihandelsavtale mellom Norge og Kina.

Nærings- og handelsdepartementet har vurdert innsynsbegjæringen på nytt. Departementet fastholder vurderingen om at det ikke kan gis innsyn i det nevnte dokument.

Innsynsbegjæringen gjelder en e-post fra Nærings- og handelsdepartementet til alle departementer. I e-posten redegjøres det for innholdet i forslag til kapittel om investeringer i de pågående forhandlingene om en handelsavtale mellom Norge og Kina. Vedlagt e-posten følger to versjoner av kapitelforslaget.

Departementets vurdering er at alle opplysningene i dokumentene kan unntas etter offentleglova § 20 første ledd bokstav b. Dokumentene gir uttrykk for interne vurderinger til bruk i pågående forhandlinger om en handelsavtale. Det følger av fast praksis at denne typen opplysninger kan unntas fra offentlighet.

Det er etter departementets vurdering heller ikke tvilsomt at innsyn i disse dokumentene vil medføre en fare for skade på Norges utenrikspolitiske interesser. Opplysningene i dokumentet er ikke alminnelige kjente og er en del av fortrolig utveksling mellom departementene som et forarbeid til handelsforhandlingene med Kina. Utlevering av opplysningene vil vanskeliggjøre Norges forhandlingsposisjon

Postadresse
Postboks 8014 Dep
0030 Oslo

Kontoradresse
Einar Gerhardsens plass 1

Telefon
22 24 90 90
Org no.
972 417 890

Næringspolitisk avdeling
Telefaks
22 24 66 69

Saksbehandler
Kristin Johnsrud
22 24 66 87

overfor Kina. Det er også sannsynlig at utlevering vil kunne forverre Norges forhandlingsposisjon i forhold til andre eksisterende og fremtidige handelspartnere. Utlevering av opplysningene vil også kunne redusere mulighetene for å ha en nødvendig åpen dialog mellom departementene.

Departementet har foretatt en konkret vurdering av hvert enkelt dokument om det kan praktiseres hel eller delvis meroffentlighet i henhold til offentleglova § 11. Departementet finner imidlertid at behovet for unntak veier tyngre enn hensynet til offentlig innsyn i dette tilfellet.

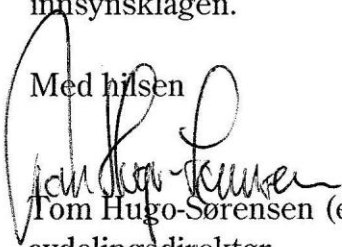
Etter departementets vurdering kan dokumentene unntas offentlighet med hjemmel i offentleglova § 20 første ledd bokstav b. Departementet mener for øvrig at dokumentene også kan unntas med hjemmel i § 20 første ledd bokstav c.

Klager ber videre om at innsyn vurderes "*etter prinsippene i forvaltningsloven § 13d*". I henhold til forvaltningsloven § 13 d *kan* departementet når det finnes rimelig og ikke medfører uforholdsmessig ulempe for andre interesser, bestemme at et forvaltningsorgan kan eller skal gi opplysninger til bruk for forskning, og at dette skal skje uten hinder av organets taushetsplikt etter § 13. Etter departementets vurdering kommer bestemmelsen ikke til anvendelse da grunnlaget for avslag på begjæring om innsyn ikke er at det vil medføre brudd på taushetsplikten. Departement finner uansett ikke å kunne legge nevneverdig vekt på at opplysningene skal brukes i forskningsøyemed, tatt i betraktning de overfor nevnte skadevirkningene ved å gjøre informasjonen offentlig kjent

Dersom klagen opprettholdes vil vi fremme saken for avgjørelse for Kongen i statsråd. Vi gjør oppmerksom på at dersom en klage på et avslag fra et departement blir fremmet for Kongen i statsråd, faller retten til å klage til Sivilombudsmannen bort. Dette fordi sivilombudsmannens arbeidsområde ikke omfatter avgjørelser truffet i statsråd, jf. Sivilombudsmannsloven § 4 første ledd bokstav b. Offentleglova § 32 første ledd sjette punktum pålegger departementet å informere om dette.

Nærings- og handelsdepartementet ber om tilbakemelding på om du fastholder innsynsklagen.

Med hilsen


Tom Hugo-Sørensen (e.f.)
avdelingsdirektør


Kristin Johnsrud
rådgiver

Appendix 4: Response Council of State



DET KONGELIGE NÆRINGS- OG HANDELSDEPARTEMENT

Emilie Ekeberg
emilie.ekeberg@gmail.com

Deres ref

Vår ref
201100353-5/KJO

Dato
15.4.2011

Behandling av klage på avslag om begjæring om innsyn – tilbakemelding

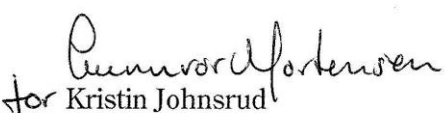
Vi viser til e-post av 24. januar 2011 vedrørende klage over avslag på begjæring om innsyn i dokument nummer 8 i sak 201001941 om det norske forslaget til investeringsbeskyttelseskapittel i forhandlingene om en frihandelsavtale mellom Norge og Kina.

Saken ble behandlet i statsråd fredag 8. april 2011. Klagen ble ikke tatt til følge.

Til orientering følger vedlagt kopi av kongelig resolusjon som ble behandlet i statsråd 8. april 2011.

Med hilsen


Tom Hugo Sørensen (e.f.)
avdelingsdirektør


for Kristin Johnsrud
rådgiver

Vedlegg

Postadresse
Postboks 8014 Dep
0030 Oslo

Kontoradresse
Einar Gerhardsens plass 1

Telefon
22 24 90 90
Org no.
972 417 890

Næringspolitisk avdeling
Telefaks
22 24 66 69

Saksbehandler
Kristin Johnsrud
22 24 66 87

Klage fra Emilie Ekeberg over avslag på begjæring om innsyn i etter offentliglova. Klagen tas ikke til følge.

Klagesaken

Nærings- og handelsdepartementet har mottatt klage i henhold til lov 19. mai 2006 nr. 16 om rett til innsyn i dokument i offentlig verksemd (offentliglova) § 32 første ledd fra masterstudent i statsvitenskap ved Universitetet i Oslo Emilie Ekeberg. Klagen gjelder Nærings- og handelsdepartementets vedtak om avslag på begjæring om innsyn i sak 201001941, dokument 8.

Dokumentet er en e-post fra Nærings- og handelsdepartementet til alle departementer. I e-posten redegjøres det for innholdet i forslag til kapittel om investeringer i de pågående forhandlingene om en handelsavtale mellom Norge og Kina. Vedlagt e-posten følger to versjoner av kapittelforslaget.

Nærings- og handelsdepartementet har etter mottakelsen av klagen på nytt vurdert offentliggjøring av opplysningene i dokument 8. Opplysningene gir uttrykk for interne vurderinger til bruk i pågående forhandlinger om en handelsavtale. Offentliggjøring av opplysningene i dokumentet vil kunne påvirke statens forhandlingsposisjon. Meroffentlighet er vurdert, jf. offentliglova § 11.

Offentliglova § 20 første ledd bokstav b gir rett til å gjøre unntak for opplysninger. Nærings- og handelsdepartementet mener imidlertid at hele dokumentet kan unntas med hjemmel i offentliglova § 12 første ledd bokstav c fordi de unntatte opplysningene utgjør den vesentligste delen av dokumentet.

Nærmere begrunnelse for avslaget i henhold til offentliglova § 31 andre ledd er gitt i brev 8. februar 2011. Klager er i samme brev gjort oppmerksom på at retten til å klage til Sivilombudsmannen faller bort når saken er påklaget til Kongen i statsråd, jf. offentliglova § 32 første ledd.

Vurdering

I henhold til offentliglova § 20 første ledd bokstav b kan det gjøres unntak fra innsyn for opplysninger når det er påkrevet av hensyn til Norges utenrikspolitiske interesser dersom opplysningene er mottatt under forutsetning av eller det følger av fast praksis at de ikke skal offentliggjøres. Opplysningene er unntatt med hjemmel i denne bestemmelsen.

Dokument 8 gir uttrykk for interne vurderinger til bruk i pågående forhandlinger om en handelsavtale. Det følger av avtale mellom Norge og Kina at opplysningene skal unntas offentlighet.

Etter en fornyet vurdering er nærings- og handelsdepartementets kommet til at offentleglova § 20 første ledd bokstav c en mer presis hjemmel i denne saken. I henhold til § 20 første ledd bokstav c kan det gjøres unntak fra innsyn for opplysninger når det er påkrevet av hensyn til Norges utenrikspolitiske interesser dersom opplysningene gjelder norske forhandlingsposisjoner, forhandlingsstrategier eller lignende og forhandlingene ikke er avsluttet.

Nærings- og handelsdepartementet mener at det ikke er tvilsomt at innsyn i disse dokumentene vil medføre en fare for å skade Norges utenrikspolitiske interesser. Opplysningene i dokumentet er ikke alminnelige kjente og er en del av fortrolig utveksling mellom departementene som et forarbeid til handelsforhandlingene med Kina. Utlevering av opplysningene vil vanskeliggjøre Norges forhandlingsposisjon, og utlevering av opplysningene vil etter nærings- og handelsdepartementets vurdering også kunne redusere mulighetene for å ha en nødvendig åpen dialog mellom departementene. Etter nærings- og handelsdepartementets vurdering kan dokument 8 derfor unntas etter offentleglova § 20 første ledd bokstav c, jf. § 12 første ledd bokstav c. Hensynet til Norges forhandlingsposisjon og nødvendigheten av en åpen dialog under forberedelse av forhandlingsdokumenter gjør også at behovet for unntak veier tyngre enn hensynet til offentlig innsyn, og at det derfor ikke er aktuelt å utvise merofentlighet etter offentleglova § 11.

Nærings- og handelsdepartementet viser for øvrig til at dokumentets formål er å hente inn opplysninger fra andre departementer til bruk i den interne saksforberedelsen til forhandlingene med Kina. Dokumentet som sådan kan derfor også unntas med hjemmel i offentleglova § 15.

Nærings- og handelsdepartementet

tilrår:

Klage fra Emilie Ekeberg over Nærings- og handelsdepartementets vedtak av 4. januar 2011 om ikke å gi innsyn i sak 201001941, dokument 8. Klagen tas ikke til følge.

